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Behavioral Science and Consumer Standard Form Contracts

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INTRODUCTION

Can insights drawn from behavioral economics point to inherent failures in the market for consumer contracts and explain their origins? The underlying thesis of this Article is that behavioral economics should have a central role in demonstrating and understanding the inadequacies of current approaches to consumer standard form contracts ("SFCs") and in forming the law that should govern them.

Contracts are binding promises[1] that result in legal relationships.[2] Contracts play a central role in people's legal experiences and interactions with one another. Many of our most important personal and everyday relationships involve contracts or are governed by them.[3]

The most pervasive kind of contract is the consumer standard form contract. Consumer contracts account for the vast majority of everyday transactions between firms (as sellers) and consumers (as

1. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) ("A contract is a promise or a set of promises . . . .").

2. U.C.C. § 1-201(b)(12) (2001) ("'Contract' . . . means the total legal obligation that results from the parties' agreement as determined by [the Uniform Commercial Code] as supplemented by any other applicable laws.").

3. *See, e.g.*, Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1419 (2004).

buyers).[4] The ubiquity of consumer SFCs cannot be exaggerated. One enters an SFC by opening a bank account, purchasing software on the web, renting a safe deposit box in a bank, or engaging in countless other day-to-day activities. This Article sets its focus on this kind of contract.

However omnipresent, SFCs depart from the classic paradigm of contract law in various conspicuous ways, and some of these departures are assumed to pose serious challenges to traditional analysis of contract law. SFCs are not a result of a negotiation process: they are offered on a "take-it-or-leave-it" basis; they do not require a "meeting of the minds"; and they are rarely read by the promisee (i.e., the consumer). In most instances, therefore, SFCs reflect sellers' informational advantage over consumers ("obligational asymmetric information"). In turn, consumers who are misinformed about the SFCs they enter might accept poor deals.[5]

Although the departures and problems associated with SFCs are well recognized, many decades of controversy have failed to produce a satisfying (let alone accepted) approach as to the proper legal treatment of consumer contracts.[6] This Article argues that a considerable part of this failure is due to the fact that important and relevant social science insights regarding consumers' behavior are widely overlooked.

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4. *See, e.g.*, W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971).

5. One could say, in other words, that an unread biased contract is a hidden defect in a product.

6. In light of these departures, scholars have proposed a number of ways to deal with consumer SFCs. These proposals can be categorized into three groups. One group focuses on providing the judiciary with the necessary tools and discretion to intervene, ex post, in appropriate SFC cases. The second group seeks to advance legislation that will protect consumers, mainly by requiring information disclosure and assuring fair or efficient contracting practices. Yet a third group seeks to minimize legal intervention in the market for consumer contract terms, arguing that market forces can lead to an efficient equilibrium where sellers have a sufficient profit-incentive to draft efficient SFCs. For further discussion, see Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to be Met*, 45 AM. BUS. L.J. (forthcoming 2008).

Much of contract law assumes that people know what they want and thus are the best judges of their own utility.[7] Nonetheless, the application of behavioral economics insights to consumer contracts calls this fundamental notion into question. Given the cognitive limitations of ordinary people, consumers as a class frequently violate the rational-maximizing-expected-utility function that contract law theory ordinarily attributes to contracting parties. In other words, presuming the efficiency of form contract terms might be misguided due to fundamental behavioral failures on the part of consumers.

The social science literature dealing with consumers' decision making is relatively well developed. There is, nonetheless, a serious gap in the legal application of this literature addressing SFCs. One of the troubling consequences of this gap is the prevalence of unfair and inefficient SFC provisions. More profoundly, this gap in legal understanding means that current approaches to SFCs are fundamentally flawed and bound to result in erratic and sometimes unjust conclusions.

Therefore, the underlying theme of this Article is that cognitive biases and consumers' actual behavioral patterns have central roles—both descriptively and normatively—in the law of SFCs. This Article explains how psychological phenomena contribute (i) to consumers' tendency not to read SFCs even when by doing so they fail to maximize their utility; (ii) to consumers' inability to correctly evaluate contract terms once they do read them; and (iii) to sellers' ability to manipulate consumers.

The contribution of this discussion is twofold: First, this Article expands our understanding regarding the inadequacies of current approaches to SFCs and the harm that consumers are exposed to when actual behavioral patterns are ignored. Second, this Article suggests valuable insights into the ways in which the design issues associated with the alternative proposed solution ought to be approached. However, it should be clear that this Article remains silent with respect to the challenge of portraying in detail a

7. This fundamental presumption is based both on the rationality assumption that accompanies economic analysis of law and on respect for individuals' autonomy.

superior mechanism aimed at dealing with SFCs. This design issue is a completely distinct project, which I address separately.[8]

The behavioral phenomena discussed in this Article are mainly based on behavioral economics models.[9] These models are an important tool in understanding some of the limits of economics and its ability to predict human behavior. Part I of this Article presents a brief explanation of these models and their general application to law.

Thereafter, this Article presents four specific behavioral patterns, each of which is particularly relevant to standard form contracting practices. The first is that buyers usually face SFCs only at the very end of a lengthy shopping process. The general assertion in this context is that at this late stage consumers are unlikely to ascribe to contract terms the full meaning or importance they deserve. This is the focus of Part II, where psychological phenomena such as the sunk cost effect, cognitive dissonance, the confirmation bias, and the low-ball technique are applied.

Second, empirical evidence supports the assertion that people have limited ability to rationally evaluate prospects of future contingencies and risks. Part III links this general failure to some typical clauses frequently incorporated in SFCs. Individuals' inability to accurately evaluate low probabilities, the availability cascade, and the prevalence of self-serving biases such as overoptimism and over-confidence serve as important starting points in this discussion.

The third behavioral pattern results from the environment that typically accompanies the offer and acceptance of consumer contracts. In many instances consumers sign (or otherwise enter into) SFCs under unfavorable circumstances. This prevents consumers from engaging in reasonable, let alone optimal, deliberation. The analysis of the behavioral effects of pressure and the attendant emotional stress as they relate to SFCs stands at the heart of Part IV.

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8. *See* Shmuel I. Becher, A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law (Sept. 20, 2007) (work in progress), *available at* http://ssrn.com/abstract=1015736.

9. Parts II, III, and V are based on behavioral economics models and studies. As detailed below, Part IV employs insights from different yet related disciplines.

The last behavioral failure addressed in this Article is the phenomenon dubbed "information overload." Generally speaking, individuals' limited ability to process information undermines optimal contracting. Part V critically evaluates the different approaches to the relevancy of information overload, demonstrating how and why it can negatively affect the likelihood of efficient terms arising in SFCs.

I. A BRIEF PREFACE TO BEHAVIORAL LAW & ECONOMICS

For many years, law and economics has been—and clearly still is—one of the most influential and dominant prisms through which law is scrutinized, explored, and studied.[10] Law and economics is a particularly powerful tool since it relies on a theory that aspires to elegantly predict human behavior and responses to incentives that the law can create and offer.[11] The behavioral theory behind law and economics is the longstanding economics model of rational choice theory, which has expanded beyond its original field.[12]

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10. Undoubtedly, both proponents and opponents of law and economics share this view. A very few examples are RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 23–26 (7th ed. 2007) (briefly reviewing the history of the economic approach to law and emphasizing the positive and normative scope of economic analysis); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1500 (1998); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829 (2003) (arguing that economic approach to contract law does not explain current doctrines and does not provide a sound basis for criticizing and reforming current contract law, but that it played a dominant role in contracts scholarship during the 1990s).

11. *See, e.g.*, Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1054–55 (2000).

12. *See, e.g.*, Thomas Gilovich & Dale Griffin, *Heuristics and Biases: Now and Then*, *in* HEURISTICS AND BIASES, THE PSYCHOLOGY OF INTUITIVE JUDGMENT 1 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002) [hereinafter HEURISTICS AND BIASES].

Law and economics has been challenged from various perspectives.[13] One repeated criticism is that traditional law and economics relies on some simplifying assumptions about human behavior and human decision making process which are neither accurate nor valid in many situations. According to this line of argument, people deviate, in systematic ways, from what is supposed (by standards of efficiency) to be rational behavior.[14]

Behavioral law and economics scholars postulate the idea that human deviation from rationality should not be limited and narrowed to economic market failures. According to behavioral law and economics proponents, there are many other circumstances where people deviate, in a systematic and predictable way, from what is expected by economics to be a rational behavior. Slightly restated, behavioral academics argue that rational-choice theory neglects to acknowledge some important aspects of human behavior.[15] Overlooking those aspects, the argument goes, can lead to erroneous predictions that should not be a part of the process of formulating legal policy.

In past years there has been increasing interest in bringing together, into a coherent theory, insights drawn from new models of human behavior and decision making.[16] Some of these behavioral models rely on psychological theories, while others are grounded on what is known as behavioral economics. These models, which have been long applied in other fields of economics

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13. Early skeptical approaches which rely, *inter alia*, on psychology and other social sciences are, for example, Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979) and Arthur Allen Leff, *Economics Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974). For a brief review of general criticism of the economic approach to law, see POSNER, *supra* note 10, at 26–27.

14. For a survey of some of the literature that documents those departures, see, for example, Langevoort, *supra* note 10. For a similar general statement see, for example, Korobkin & Ulen, *supra* note 11, at 1055.

15. *See, e.g.*, Jeffery J. Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 765 (2000).

16. *See, e.g.*, Korobkin & Ulen, *supra* note 11, at 1057; Langevoort, *supra* note 10, at 1502. One prominent example is BEHAVIORAL LAW & ECONOMICS (Cass R. Sunstein ed., 2000).

and are now being applied to law,[17] aim to present competing behavioral models different from the ones employed by the neoclassical law and economics theory.[18]

In spite of the fact that this relatively new legal field—which is frequently termed "behavioral law and economics"[19]—challenges the traditional law and economics approach, it also accepts some of its basic methodologies. One such accepted premise is important to note here: behavioral economics readily adopts the assumption that peoples' behavior does not only systematically deviate from rationality, but that many of these deviations are predictable and thus should be modeled.[20] Following this fundamental understanding, the main task of behavioral law and economics is to create a framework that better explores, and thus better predicts, actual human behavior and its implications for different bodies of law.[21] I now turn to examine and apply the relevant behavioral insights in relation to consumer SFCs.

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17. For an argument that there is a sharp gap in the application of these competing models between law on one hand and other economic fields on the other, see, for example, Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473 (1998).

18. In many instances, these competing models differ from the classical economic ones since they focus on the concern that "[i]f people make systematic errors in judgment, then they will make bad choices even when they have the incentives and information needed to make good ones, and hence, do themselves harm if left to their own devices." Jeffery J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1166 (2003).

19. Scholars have been using different terms when referring to this field. The term "Behavioral Law and Economics" has been used, for instance, by Jolls et al., *supra* note 17, and Langevoort, *supra* note 10. For other terms, see, for example, Korobkin & Ulen, *supra* note 11 ("Law and Behavioral Science") and Rachlinski, *supra* note 15 ("Law and Psychology"). I use these terms interchangeably.

20. *See, e.g.*, Jolls et al., *supra* note 17, at 1474 ("The unifying idea in our analysis is that behavioral economics allows us to model and predict behavior relevant to law with the tools of traditional economics analysis, but with more accurate assumptions about human behavior . . . ."); Cass R. Sunstein, *Introduction* to BEHAVIORAL LAW AND ECONOMICS, *supra* note 16, at 1 (arguing that people's behavior, though not "rational" in the way that economists intend, "can be described, used and sometimes even modeled").

21. *See, e.g.*, Jolls et al., *supra* note 17, at 1476; Korobkin & Ulen, *supra* note 11, at 1058; Rachlinski, *supra* note 15.

II. PERCEPTION OF SELF COMMITMENT

Contract law assumes that contracts are drafted or negotiated by both contracting parties. Yet, one of the distinct characteristics of consumer contracting is that sellers usually present their contracts for consumers' acceptance at the end of a shopping process, when buyers have actually made up their minds to enter the transaction at issue. Consumers who wish to acquire information regarding the transaction at stake are very likely to do so *before* sellers present their contracts. By constructing the process this way, sellers can increase the chances that consumers will not carefully examine the contract they enter. At this late stage of the shopping process, behavioral patterns might prevent consumers from engaging in significant comparison shopping.

This part argues that common psychological phenomena—the sunk cost effect, the cognitive dissonance theory, the confirmation bias, and the low-ball technique—can contribute substantially to consumers' unwillingness to efficiently process information incorporated in an SFC. In addition, the analysis below demonstrates that those biases can have an important role in drafting specific SFC terms and in regulating consumer transactions. All these arguments will be addressed in turn in the next sections.

A. The Sunk Cost Effect

Utility maximization assumes that individuals have a stable set of preferences not influenced by irrelevant factors. One possible irrelevant factor, in this respect, is past investments. Economists use the term "sunk cost" to refer to preceding investments which cannot affect the expected marginal utility from future activities or decisions. Since sunk costs are not recoverable through subsequent action, conventional analysis expects decisionmakers to maximize their utility by ignoring such irrelevant costs.[22]

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22. *See, e.g.*, POSNER, *supra* note 10, at 7 ("Rational people base their decisions on their expectations of the future rather than on their regrets about the past."); RICHARD A. BREALEY & STEWART MYRES, PRINCIPLES OF CORPORATE FINANCE 115 (5th ed. 1996) (articulating the famous phrase: "Sunk cost are like spilt milk: they are past and irreversible outflows."); William Samuelson &

Accordingly, rational individuals are expected to base their decisions solely on the costs and benefits from the moment they make their decision and forward.[23]

Since rational decisions should be based on incremental costs and benefits, rational consumers ought to read (or ignore) SFCs purely on the basis of the expected utility that reading (or ignoring) entails. This is to say, the resources invested by a consumer during her shopping process prior to entering a contract should be deemed irrelevant sunk costs when assessing the expected value of reading (or ignoring) the SFC she enters.

Behavioral economics proponents challenge the fundamental prediction according to which sunk costs should not—or do not—matter. Although conventional economics expects individuals to ignore sunk costs, empirical studies demonstrate that sunk costs do matter and influence decisionmakers' behavior.[24] To describe this phenomenon, behavioral economics scholars use the term "sunk cost effect."[25] The sunk cost effect, as this argument goes, "is manifested in a greater tendency to continue an endeavor once an

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Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 37 (1988) ("One of the earliest lessons in economics is that decisions should be based on incremental benefits and costs.").

23. A more intuitive way to put it, however, is that "[a] person should not stop at the gym on the way home from work merely because he has paid a hefty annual membership fee; he should stop only if he expects that the utility derived from a workout will exceed the utility derived from getting home earlier." Korobkin & Ulen, *supra* note 11, at 1124.

24. *See, e.g.*, Jolls et al., *supra* note 17, at 1482–83, nn.25–28, 1490–92 (discussing the theater patron study and the ultimatum game and its sunk-cost variation); Korobkin & Ulen, *supra* note 11, at 1073–74 (noting the ample evidence demonstrating that many people attend a performance once they have paid for a ticket, reasoning that otherwise it is a waste of money); *id.* at 1124 ("Notwithstanding economic wisdom to the contrary, people routinely cite sunk costs as a reason for pursuing a particular course of action."); Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903, 919 (2002) ("People facing high-risk situations, are more likely to gamble on a risky outcome than to accept the loss upfront. 'Rational' or not, their commitment to the situations escalates, sunk costs dominate, and the ability to pull back and reexamine the situation is diminished.").

25. *See* Richard Thaler, *Towards a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 47 (1980).

investment in money, effort, or time has been made."[26] Moreover, it is predicted that "the larger the past resource investment in a decision, the greater the inclination to continue the commitment in subsequent decision."[27] Allowing sunk costs to influence one's decision making violates the traditional economical principle that presumes individuals will choose among competing options regardless of the ways in which these options are framed.

To understand this behavioral pattern and its implication to the law of SFCs, it is important to clarify why people allow sunk costs to influence their decisions. The main explanation is based on motivational grounds—that the sunk cost effect can be best justified as a self-esteem maintenance device.[28] People might feel compelled to maintain a past-chosen course of action as a means of preserving some aspects of self-perception. Hence, the sunk cost effect is predicted, in part, because of people's aspiration to not be—or appear—wasteful.[29]

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26. Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost,* 35 ORG. BEHAV. & HUM. DECISION PROCESS 124 (1985) (presenting a study of theater patrons that revealed that those who were randomly assigned discounted tickets attended significantly fewer performances).

27. Samuelson & Zeckhauser, *supra* note 22, at 37. Probably the most famous and common examples are those of large public projects. *See, e.g.*, Arkes & Blumer, *supra* note 26, at 124 (citing Senator Denton: "To terminate a project in which $1.1 billion has been invested represents an unconscionable mishandling of taxpayers' dollars," and Senator Sasser: "Terminating the [Tennessee-Tombigbee Waterway] project at this late stage of development would . . . represent a serious waste of funds already invested.").

28. For modeling sunk cost and grounding it on prospect theory, see Thaler, *supra* note 25, at 48–49. According to Thaler's modeling, the sunk cost effect can be explained by referring to the "pain" (which corresponds to the value function in the domain of loss) that a consumer suffers from the loss of past investments. *Id.* That modeling also explains why the more resources one invests, the more likely he is to display a sunk costs effect.

29. Arkes & Blumer, *supra* note 26, at 132 ("One reason why people may wish to throw good money after bad is that to stop investing would constitute an admission that the prior money was wasted. The admission that one has wasted money would seem to be an aversive event. The admission can be avoided by continuing to act as if the prior spending was sensible, and a good way to foster that belief would be to invest more.").

Behavioral law and economics scholars frequently adopt this line of reasoning, emphasizing the notion of consistency.[30] In this respect, changing a prior course of action might simply imply that the preceding decision was a mistake. Furthermore, overcoming the sunk cost effect is likely to be an extremely challenging task, which most people cannot undertake successfully. At times, this is true even for sophisticated parties that have been trained and instructed to ignore behavioral biases.[31]

The sunk cost effect is ubiquitous for numerous monetary and non-monetary investments.[32] The idea of a "sunk cost effect" has been applied by behavioral law and economics scholars in a number of different contexts.[33] Surprisingly enough, however, there is almost no application to the field of consumer SFCs.[34]

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30. *See, e.g.*, Korobkin & Ulen, *supra* note 11, at 1125 ("People often pay heed to sunk cost because they want to act consistently. And while the desire for consistency can be foolish in the face of changed circumstances, it can also be quite sensible when our past actions are based on reliable evaluations of costs and benefits." (footnotes omitted) (citing ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 50–93 (3d ed. 1993)); Donald C. Langevoort, *Ego, Human Behavior, and Law*, 51 VA. L. REV. 853 (1995).

31. *See, e.g.*, Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 214 (1999) ("[T]his theory [that people hate certain losses] helps explain why otherwise rational business people will commit money to keep a venture alive that has lost them a great deal in the past, when new investors are reluctant to invest."); Mark Seidenfeld, *Symposium: Getting Beyond Cynicism: New Theories of the Regulatory State Cognitive Loading, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 500, 517 (2002) (revealing experiments that demonstrate that even experts who are aware of maximizing rules such as ignoring sunk cost may fail to utilize them).

32. *See* Arkes & Blumer, *supra* note 26, at 139 (concluding that "the sunk cost effect is a robust judgment error").

33. One prominent example is the stage in which individuals face a decision whether to settle a case or to litigate it in court. *See, e.g.*, Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summery Judgment*, 100 YALE L.J. 73, 113–14 (1990) (claiming that procedural mechanisms aimed at increasing up-front information sharing and evaluation may not have the desired pro-settlement effect due to, *inter alia*, the sunk cost effect phenomenon); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 131–32 (1997).

34. For one exception, see Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 289–90 (1990). Katz argues that buyers prefer not to read SFCs since

This Article takes the position that the sunk cost effect plays an important role in consumers' decisions not to read SFCs. Since the efforts to become familiar with the transaction's details are sunk, a natural tendency, according to the framework proposed by behavioral law and economics, is to ignore potentially adverse terms that the SFC may contain, although this tendency is irrational according to traditional law and economics. Once a consumer has spent substantial time and effort deciding to purchase a specific good, she will seek to economize on these efforts and go ahead with the transaction at stake, regardless of the content of the SFC she accepts.

Since the sunk cost effect exists in conjunction with the amount of resources previously invested, its effect varies substantially among different kinds of transactions. Certainly, shopping efforts diverge significantly for different kinds of markets and products. Yet, as a general argument, in most cases vendors present their SFC only *after* the shopping process has actually ended. Since the consumer is likely to spend a considerable amount of time in order to become acquainted with the good or service she is about to purchase *before* the SFC is presented, the sunk cost effect may contribute to her decision to ignore the accompanying contract.

However, the sunk cost effect might prove too much if it is understood as a plain argument in favor of invalidating SFCs or negating consumers' acceptance of them. This is definitely not what the argument seeks to establish, especially since it seems unlikely that buyers and sellers will discuss all contractual terms at

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they know that once they do read standardized terms they incur sunk costs which may induce them to enter a "barely acceptable deal." In my opinion, however, Katz's application is fairly partial since it addresses sunk costs only with respect to reading a contract, rather than placing the phenomenon of sunk costs in the broader contexts of consumer search and behavior. Second, Katz's analysis seems not to distinguish between sunk costs and cognitive dissonance. *See infra* Part II.B. Third, the assertion that consumers will avoid reading SFCs in order not to accumulate sunk costs, which might distort rational decisions, seems to attribute ordinary consumers with far too much rationality.

For another exception, see source cited *infra* note 56 and accompanying text. This application, as will be explained *infra* Part II.E, differs substantially from the one expressed here since it is tailored to a specific kind of contractual term (i.e., periodic payments).

the very beginning of the shopping process. However, it is necessary to acknowledge that sunk cost *is* an important factor in standard form contracting. Hence, in some cases the sunk cost effect should be considered against the assumption that buyers enter SFCs after having had the opportunity to rationally inspect their content. This is particularly true in those cases where buyers incur substantial sunk costs or where sellers manipulate the transaction so as to exploit the sunk cost effect.

The rolling contract paradigm can serve as a good illustration. Nowadays, many consumers use the internet for purchasing products and services.[35] In the e-commerce context, it is very common for consumers to read or obtain the relevant contract terms only after purchasing (and at times, receiving) the purchased item.[36] Obviously, at this stage consumers are likely to complete their shopping process, incurring substantial sunk costs. Moreover, at this late stage it may be costly for a consumer to change his mind and return the product, since getting rid of it requires some additional investment and effort.[37]

The rolling contracts paradigm demonstrates how relevant the sunk cost effect can be in modern consumer markets. Where the transaction is structured in a way that allows consumers to inspect the contract only at a very late stage, it is problematic to assume consumers are making rational decisions in accepting SFCs.

Thus, the sunk cost effect might foster suboptimal decision making and increase inefficient and unfair contracting. Sellers aware of the fact that sunk cost is so frequently hard to ignore can

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35. For instance, it is reported that for the year 2006, total consumer online spending reached $170 billion. *Online Consumer Spending to Hit $170 Billion in 2006*, METRICS 2.0, Oct. 26, 2006, http://www.metrics2.com/blog/2006/10/26/online_consumer_spending_to_hit_170_billion_in_200.html (last visited July 8, 2007).

36. *See, e.g.*, Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 744 (2002) ("In a rolling contract, a consumer orders and pays for goods before seeing most of the terms, which are contained on or in the packaging of the goods. Upon receipt, the buyer enjoys the right to return the goods for a limited period of time." (citing Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997)).

37. For instance, a consumer who wants to return a product might need to go to the post office in order to ship it back or to call the seller and explain why he is not interested in the product.

utilize this phenomenon. For example, sellers can manipulate the contracting process in a way that exploits consumers' behavioral failures and tendencies by hiding their contracts inside products' packages, by intentionally postponing the discussion about contractual terms, or by presenting the SFC at the latest possible stage.

B. Cognitive Dissonance

A related way to analyze consumers' self commitment to transactions that involve SFCs is by invoking the cognitive dissonance theory. This theory suggests that people are reluctant to hold conflicting ideas simultaneously. Such reluctance can lead people to devalue evidence that undermines their choices *ex post*. At the same time, cognitive dissonance also suggests that people will adjust their beliefs in order to justify their previously made choices and preferences (thus revaluing previous choices upwards so they appear more beneficial).[38]

As noted, in many (if not most) instances consumers decide, consciously or not, to enter a transaction before being confronted with an SFC. If an SFC is introduced when the purchaser has already decided to enter a transaction, cognitive dissonance may prevent him from rationally evaluating the contract terms he finds in the pre-drafted form. Where the contract terms he encounters undermine the utility he hopes to derive from the transaction at issue, cognitive dissonance may preclude efficient evaluation. Moreover, the natural human desire to avoid cognitive dissonance might imply that consumers are likely to prefer, consciously or not, *not* to read the form contract and realize that they may be about to enter into a poor contract, knowing that they are probably going ahead with the transaction anyway.[39] As before, the option of not realizing the terms of the contract one enters is quite exceptional

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38. *See* ELLIOT ARONSON, THE SOCIAL ANIMAL 178–79 (7th ed. 1995) (defining cognitive dissonance as "a state of tension that occurs whenever an individual simultaneously holds two cognitions (ideas, attitudes, beliefs, opinions) that are psychologically inconsistent," where the tension can be reduced "by changing one or both cognitions in such a way as to render them more compatible (more consonant) with each other").

39. *See* Katz, *supra* note 34, at 288–89.

(though not exclusive) to the context of SFCs. In most other contracts both contracting parties take an active role in the contract's formation.

C. The Confirmation Bias

The sunk costs effect and the cognitive dissonance phenomenon can be related, in part, to another psychological observation: the confirmation bias. According to this bias, individuals who form an opinion appear to search for data that supports and confirms their existing opinion rather than information that might challenge or contradict it.[40] Once again, empirical experiments support the assertion that it may be difficult to eliminate this bias.[41]

Therefore, if a consumer has formed an opinion about a service or product and has reached a (preliminary) decision to enter a specific transaction since he believes it would be beneficial to do so, he is more likely to search for reinforcing indications to buttress this decision. Assuming that most consumers do not expect to find positive signals (to further denote that the transaction they are about to enter is a favorable one) integrated in SFCs, the confirmation bias might prevent them from reading such contracts in the first place.

No less importantly, the confirmation bias can explain why those consumers who *do* read SFCs are not likely to evaluate their content rationally. According to the confirmation bias, people predictably not only search for information that reinforces their previous belief, but also process information they encounter in a way that strengthens their already existing viewpoints.[42] Given

40. *See, e.g.*, SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 233 (1993) ("[The confirmation bias] usually refers to a preference for information that is consistent with a hypothesis rather than information that opposes it.").

41. *See id.* at 238–39.

42. *See* ARTHUR S. REBER, THE PENGUIN DICTIONARY OF PSYCHOLOGY 151 (2d ed. 1995) (defining confirmation bias as "the tendency to seek *and interpret* information that confirms existing beliefs" (emphasis added)).

this aspect of the confirmation bias, even if consumers read SFCs they should not be expected to evaluate them objectively.[43]

D. The Low-Ball Technique

The last relevant phenomenon to note in this context of past investment and perceptions of self-commitment is the low-ball technique. Basically, the low-ball technique is a procedure in which an agent is underestimating or understating a price. For example, a typical case of the low-ball technique occurs where salesmen (or advertisements) get a subject to agree (or to consider) to purchase an item at a discounted price. Later on, the discount is removed, but the initial decision to enter the transaction can lead the subject to assent to the new (yet higher) price.[44]

Perhaps a few practical examples can be useful. In e-commerce, for instance, it is not uncommon to find a seller stating, up front, the total price of a given product. Yet, when the consumer is about to enter the deal and pay for the product, he is being requested to pay for additional hidden charges (such as "shipping and handling," an "online service fee," a "general membership fee," etc.).

This technique is also used where consumers purchase services or products that are continuous in their nature. A prominent example is an introductory rate[45]—a technique repeatedly employed by sellers to tempt potential clients to purchase long-

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43. Hillman and Rachlinski use the term "motivated reasoning" to illustrate this idea. *See* Robert A. Hillman & Jeffery J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 453 (2002) ("Because consumers usually encounter standard terms *after* they have decided to purchase the good or service, they will process the terms in the boilerplate in a way that supports their desire to complete the transaction.").

44. A harsh version of this technique is the notorious "bait-and-switch" selling tactic. The FTC considers "bait-and-switch" as a family of practices where an initial ad offers an especially tempting price on a certain model as "bait" to attract consumers. Thereafter, sales staff commences to "switch" the purchases to other items, usually at a higher price. The FTC has declared this technique as deceptive and therefore unlawful. *See* 16 C.F.R. § 238 (2003).

45. The term "teaser rate" is used in the context of mortgage and credit card agreements to describe a very low—yet very temporary—introductory rate. This "teaser rate" practice can be viewed, in a way, as a low-ball technique.

term services such as internet or telephone.[46] In such cases, consumers are more likely to assent to the amended price than they would have been had the seller stated the actual price from the very beginning. Accordingly, subjects that are exposed to the low-ball technique may enter a transaction even though the true, long-term price can no longer be considered a "good deal";[47] or, using the economists' terminology, it does not maximize the subject's utility.

A good illustration of the low-ball technique is found in the famous contract case of *Hoffman v. Red Owl Stores, Inc.*[48] In this case, Hoffman, a prospective franchisee, was confronted with a series of increasingly burdensome franchise conditions, gradually raising the franchise's price. As the Wisconsin Supreme Court described:

> The record here discloses a number of promises and assurances given to Hoffman . . . . Foremost were the promises that for the sum of $18,000 Red Owl would establish Hoffman in a store. After Hoffman had sold his grocery store and paid the $1,000 on the Chilton lot, the $18,000 figure was changed to 24,100. Then . . . Hoffman was assured that if the $24,100 were increased by $2,000 the deal would go through.[49]

This case and the question it presents with respect to contract-like liability in pre-contractual negotiations have been discussed at length.[50] Although there are a number of ways to approach this case, the low-ball technique and the sunk cost effect provide an additional angle and a more subtle explanation as to why the court showed sympathy to, and ruled in favor of, Hoffman.

When giving this selling tactic another thought, it should be apparent that the underlying idea of the low-ball technique is relevant to many consumer markets. During the course of market shopping and negotiation, it is very common for salesmen to

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46. This second type of low-ball technique is related to people's propensity to focus on current consumption. *See infra* Part III.D.

47. *See, e.g.*, Arkes and Blumer, *supra* note 26, at 138.

48. 133 N.W.2d 267, 274 (1965).

49. *Id.*

50. *See* Ian Ayres & Gregory Klass, *Promissory Fraud Without Breach*, 2004 WIS. L. REV. 507, 515–17 (2004) and accompanying notes.

clarify to consumers what their legal rights are, what the sellers' responsibilities are, and what the products' or services' characteristics are. Moreover, many products and services are advertised. Advertisements form consumers' expectations about their legal rights, the promised results of using a given product, the risks associated with a product, and the like.

Yet, SFCs that accompany any given transaction might not completely correlate with what has been previously stated or otherwise promised. Some positive transactional attributes (from consumers' perspective) that have been emphasized or promised are sometimes not (fully) incorporated into pre-drafted SFCs. The gap between what was promised or stated on one hand, and what is actually agreed upon in the contract's four corners on the other, resembles the low-ball technique.[51]

As noted, the rationale for employing this technique is that an otherwise unlikely investment is more likely due to one's prior decision to commit. Using the low-ball technique, salesmen can induce buyers to go ahead and sign SFCs that the buyers would not enter had they fully realized the terms and substance beforehand.[52] This is true because a consumer's prior decision to agree to a specific set of terms is based on what was orally promised or otherwise advertised. Consequently, consumers' preliminary commitment might result in a greater tendency to enter SFCs while ignoring—or devaluing—what is actually incorporated in print and imposed in practice.

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51. Interestingly, the drafters of the U.C.C. were aware of this problem (at least in part). U.C.C. section 2-209 requires that contractual terms that bar oral modification should be separately signed. U.C.C. § 2-209(2) (2001).

52. However, this is not the only technique that sellers use when referring to the gap between what SFC terms state and what has been previously stated or promised. At times, and as supplementary measures, sellers ask customers to trust them or to ignore the "legal gobbledygook" in the SFC. Additionally, sellers might undermine the importance of the written contract and the prospects that it will be used against the customer. Finally, sellers might err (or exploit consumers' lack of legal expertise) and interpret or explain SFC terms incorrectly.

E. Specific Contract Terms

The discussion thus far shows that specific behavioral patterns prevent consumers from reading SFCs or rationally evaluating their substance. This section further discusses two potential ways in which the formation of *specific* SFC terms might advance the exploitation of these behaviors. The first method of exploitation is to premise the transaction on periodic payments; the second method is to use unilateral modification clauses.

1. Rent-to-Own Transactions and Periodic Payments Terms

Many consumer goods can be purchased through credit transactions. Some of these transactions are based on periodic payments. Sellers of consumer goods frequently construct their SFCs so that buyers are obligated to make periodic payments.[53] Even though consumers may have the contractual right to stop the payments and return the merchandise, the sunk cost effect can prevent them from discontinuing paying. According to Korobkin and Ulen, such deals are often attempts to take advantage of people's propensity to commit to a course of action once they have incurred sunk costs.[54]

People's commitment to sunk cost and the use of contractual terms to secure this commitment is particularly evident in "rent-to-own" deals. In typical rent-to-own transactions, a consumer agrees to rent a product for one week or one month at a time. In contrast to regular rental and monthly payment deals, in a rent-to-own transaction, the consumer does not have a contractual obligation to continue paying for the entire life of the loan. It is also common in such arrangements for sellers to take upon themselves the obligations to repair and maintain the product as long as it is rented.

Most importantly to the present context, in rent-to-own transactions the consumer is given the option of purchasing the

53. *See* Korobkin & Ulen, *supra* note 11, at 1126.

54. *Id.* Accordingly, they propose that "[t]o the extent that lawmakers believe that such contracts result in many consumers' failing to maximize their utility, those lawmakers might consider implementing restrictions on the way consumer contracts may be structured." *Id.*

rented item. Once a consumer decides to buy the rented merchandise, past rent payments, at least to some extent,[55] can be applied towards ownership. Alternatively, a consumer may become the owner of the rented product once he completes a given period of rent, commonly 18 months. At times, the consumer will be required to pay an additional fee for becoming the owner.

Consumers enter rent-to-own transactions for various reasons. One common reason is insufficient funds for making a regular purchase. Another reason may be bad credit. Whereas these reasons might lead to an informed preference (that is, a result of a reasonable deliberation) to enter such transactions, consumers also enter rent-to-own agreements for less "rational" reasons.

For instance, sellers tempt buyers to enter rent-to-own transactions by presenting them as risk-free transactions, as opportunities to experience the products without making a long-term commitment, and by emphasizing the option of making flexible payments. Such deals, which usually require consumers to pay a great deal more than the regular cash price for the rented item,[56] exploit consumers' tendency to commit to sunk cost.[57] Once a consumer spends time in choosing a product, spends money in renting it, and becomes familiar with (or even attached to) its characteristics, there is a higher likelihood that the item will eventually be purchased, even though it is offered for a supra-competitive price. In these cases, the SFC terms that guarantee periodic payments reinforce buyers' commitment to sunk cost.

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55. Some sellers restrict, by indicating a specific timeframe, the scope of rental payments that can be applied towards purchase. A common term will note, for instance, that the consumer "can apply all rental payments in the first 90 days towards ownership."

56. *See, e.g.*, State of Wisconsin, Department of Financial Institutions, Brochures: Rent-to-Own, http://www.wdfi.org/ymm/brochures/credit/rent_to_own.htm (last visited July 8, 2007) ("Purchasing merchandise from a rent-to-own company usually costs two to five times as much as purchasing the merchandise from a department or appliance store. If the difference between the total payments and the fair market value of the product was expressed as an interest rate, the rate is commonly over 100%, and at times over 300%.").

57. These deals also exploit the Western consumer culture, where over-consumption and instant gratification are the norm. For relating behavioral failures to consumer culture, see *infra* notes 100–105 and accompanying text.

Against this background, it is worthwhile to consider the well-known case of *Williams v. Walker-Thomas Furniture Co.*[58] In this famous case the court addressed the conscionability of a repossession clause in an installment SFC. The contractual provisions at issue purported to lease the purchased items to appellant for monthly payments. The contract provided that ownership would remain with Walker-Thomas until the total of all payments reached the stated value of the item, and that in the event of default Walker-Thomas could repossess the item. A cross-collateral clause stated that "all payments now and hereafter made by [purchaser] shall be credited pro rata on all outstanding leases, bills, and accounts due to Company by [purchaser] at the time each such payment is made."[59] In other words, in case the buyer rents more than one item, the retailer holds the title of *all* products until *all* items, whenever purchased, are fully paid for.[60]

Much ink has been spilt over this case, but its behavioral facets have been often overlooked. By constructing their transactions as monthly payments and exploiting the sunk cost effect, Walker-Thomas increased plaintiffs' commitment to continue renting the items until all payments were made and ownership obtained. Moreover, incorporating the cross-collateral term expanded this commitment to the newer items on which nothing had yet been spent by the purchaser. This might be one of the reasons that led the court to express sympathy with Williams, despite her questionable legal claims.

2. *Unilateral Modification Terms*

Many sellers draft contractual terms that allow them wide discretion in changing and amending pre-drafted provisions. Invoking the low-ball technique, sellers might draft standardized clauses that enable them to change the SFC in a way that shifts

58. 350 F.2d 445 (D.C. Cir. 1965).

59. *Id.* at 447.

60. The court explained that, due to this term, "the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings." *Id.*

risks from one contracting party to the other. Consider, for example, the following modification term which is commonly found in consumer contracts:

> [The seller] may change, add or delete these Terms and Conditions of Use or any portion thereof from time to time in its sole discretion. [The seller] will provide you with reasonable notice of any changes. Thereafter, you [The Buyer/User] expressly agree to be bound by any such amended Terms and Conditions of Use.[61]

In certain fields of commerce, such as the credit card industry, guaranteeing the ability to change SFC terms unilaterally by using such modification clauses has become a standard business practice.[62] In light of people's tendency to comply with a later, less-favorable condition, sellers might employ this discretion and change their agreements in a self-serving manner even when the new terms are socially inefficient.

Thus, sellers who use this technique might induce consumers to agree, more easily, to the modified less-favorable new set of SFC

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61. This specific example was taken from Camcorder HQ, Camcorders: Terms of Use, http://www.digitalcamera-hq.com/camcorder/info/terms-of-use.html (last visited July 8, 2007). Similar pre-drafted contractual terms appear in many other websites' standardized agreements. *See, e.g.*, TripAdvisor.com, Terms and Conditions of Use, http://www.tripadvisor.com/pages/terms.html (last visited July 8, 2007).

62. For example, Chase accompanies their Chase Visa Platinum offer with a term that reads:

> You understand that the terms of your account, including the APRs, are subject to change . . . . *We reserve the right to change the terms* (including the APRs) *for any reason*, in addition to APR increases that may occur for failure to comply with the terms of our account. Any changes will be in accordance with your Cardmember Agreement.

(emphasis added). Similarly, Elite Rewards Platinum Plus MasterCard Credit Card accompany their credit card offer with a detailed set of terms and conditions, which include a statement that reads, "Account and Agreement are not guaranteed for any period of time; all terms including the APRs and fees, may change in accordance with the Agreement and applicable law." *See also* John J.A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 323 (2000).

terms.[63] Because of the low-ball technique, sellers who change contract clauses by making them less beneficial to consumers will not encounter such strong resistance as they would have were such terms introduced in the first place.[64]

To summarize this part, the sunk cost effect, cognitive dissonance theory, confirmation bias, and low-ball technique can be related to SFCs in three major ways: First, they explain consumers' unwillingness to read the SFCs they sign or otherwise enter. Second, they undermine consumers' ability to evaluate objectively and optimally the terms of which they *are* aware. Third, these phenomena have an important role in drafting specific SFC terms—such as periodic payments and unilateral modifications clauses—as they provide sellers with additional incentives to manipulate consumers.

III. DISTORTION AND MISPERCEPTION OF CONTRACTUAL RISKS

Contract terms allocate risks among contracting parties. According to the conventional expected-utility-theory, a rational individual should evaluate an action in terms of the level of welfare it produces, evaluate uncertain outcomes according to their expected value, and calculate outcomes, probabilities, and values by optimally using available information.[65] Put simply, contracting parties are expected to base their judgments on an accurate assessment of the risks involved. Hence, if we expect contracting parties to behave rationally, we must, as a prerequisite, assume rational risk perception. Accordingly, consumers who are

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63. To the extent that a unilateral change clause is drafted with the intention of making a delayed change, other doctrines aimed at deterring insincere contracting, such as promissory fraud liability, may be invoked. *Cf.* Ayres & Klass, *supra* note 50 (arguing that breach of contract is not a necessary component of promissory fraud).

64. Note, however, that firms incorporate such modification terms in their pre-drafted agreements in order to maintain maximum flexibility and to allow better responsiveness to changing circumstances. Nevertheless, the argument here is that this technique also allows firms to degrade SFC terms and make them socially undesired in a more "elegant" yet not fully appreciated way.

65. *See* Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, *in* BEHAVIORAL LAW AND ECONOMICS, *supra* note 16, at 325, 327–28.

misinformed about the risks the contract allocates are actually misinformed about the product itself.[66]

Whereas standard economic analysis assumes that people have clear and stable risk preferences, empirical evidence supports a contrary assumption. According to this contrary presumption, risk preferences and perceptions are often inconsistent and mistaken. Since evaluating risks is a demanding and challenging cognitive task, most people employ heuristics in the process of risk evaluation.[67] Thus, cognitive theory proposes a wide array of important insights as to the actual way people make decisions when facing risks and uncertainties.[68]

This part argues that some of these insights are particularly relevant to SFCs. The underlying assertion to be articulated at the outset is that the way that people evaluate risks in real world settings may result in a systematic distortion of the perception of risks. The simple application of this idea to our context is that such a distortion has an inevitably harmful effect on consumers' ability to properly evaluate risk-allocation terms frequently incorporated into SFCs.[69]

Broadly speaking, misperception of risk is typically due to two kinds of mistakes. First, individuals may err in evaluating the prospects of a specific hazard (e.g., getting incorrect the statistical danger of smoking). Second, people might have the accurate

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66. Michael Spence, *Consumer Misperceptions*, 44 REV. ECON. STUD. 561, 561 (1977) ("To be misinformed about the probabilities of product failure, is to be misinformed about the product.")

67. *See, e.g.*, Hillman & Rachlinski, *supra* note 43, at 450 and accompanying notes.

68. *See generally* HEURISTICS AND BIASES, *supra* note 12; JUDGMENT UNDER UNCERTAINTY (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

69. As was noted in Part I, cognitive theory aspires to demonstrate not only that such heuristics exist, but also how they can be documented and modeled. This part focuses on documented biases that past experiences and competitive markets are not likely to correct, and proposes that some kind of policy or legal intervention might be inescapable. For a discussion of policy implication in the context of misperception of low-probability, high-consequence risks, see, for example, Colin F. Camerer & Howard Kunreuther, *Decision Processes for Low Probability Events: Policy Implications*, 8 J. POL'Y ANALYSIS AND MGMT. 565 (1989).

statistical information but nevertheless react in a sub-optimal way (e.g., ignoring the danger of smoking even while being aware of the relevant statistical facts). Sections A and B correlate with the first source of mistakes; sections C and D deal with the latter.

A. Low-Probability Risks

The work of cognitive psychologists supports the assertion that people encounter serious difficulties in assessing low-probability risks.[70] This difficulty is frequently manifested in underestimation of risks.[71] Moreover, unless made salient, low-probability risks are even likely to be ignored.[72] For instance, individuals tend to ignore low-probability risks by refraining from purchasing insurance, even when its purchase is highly subsidized.[73]

This part argues that people's difficulty in assessing low-probability risks may have an important role in consumers' misperception of SFCs and the risk they allocate. As Eisenberg notes, "most preprinted terms are nonperformance terms that relate to the future and concern low-probability risks."[74] Those terms are seldom made salient. Contract clauses that deal with liability and warranty, conflict of laws, default in payments, and mandatory arbitration are some common examples of usually non-salient

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70. For a discussion of low-probability, high-consequence events, see, for example, Howard Kunreuther, Nathan Novemsky & Daniel Kahneman, Making Low Probabilities Useful, 3, 5 (1990), http://grace.wharton.upenn.edu/risk/downloads/01-17-HK.pdf (referring to previous research which demonstrates that "many people are not able to meaningfully use probability information in these contexts [of low probability high consequence events]" and stating more generally that "many studies find that people have difficulty interpreting low probabilities").

71. *Cf.* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 222 (1995) and accompanying notes.

72. It should be noted, however, that underestimation (or complete disregard) of risk is not the only possible approach towards low-probability risks. There is also the possibility, under some circumstances, that such risks will be overestimated. This can happen when dealing with personal injury risks or where people cannot avoid risk confrontation. *See, e.g.*, *id.* at 223–24 and accompanying notes.

73. *See, e.g.*, Camerer & Kunreuther, *supra* note 69, at 570 (referring to two confirming studies).

74. *See* Eisenberg, *supra* note 71, at 240.

standardized contractual clauses that allocate risks among contracting parties and address future low-probability contingencies.

Two of the reasons that lead people to ignore low-probability risks are relevant to note here. One reason is to satisfy humans' natural inclination to eliminate uncertainties.[75] Consequently, consumers might ignore some contractual risks due to this preference. Another possible explanation is that people often employ and design relatively simple models in order to assure easier communication and a simpler decision making process. Ignoring low-probability risks, therefore, allows people to simplify the decisions they face.

A common strategy for creating simplistic decision making models is by attributing a high importance to the probability level of risks while ignoring other aspects of the risks involved. It is reasoned that where probability is perceived to be the critical dimension in decision making, if a given probability is below a threshold level, people will often refrain from taking any action.[76] Another common simplifying strategy is to focus on possible outcomes of a given risk and compare them to a threshold. Where the worst case scenario of the risk at stake does not reach the threshold, people are not likely to take the necessary precautions.[77]

Thus, consumers might opt to devalue risks integrated in SFC terms since in many casual and daily transactions the probabilities that those terms address, and their potential outcomes, might not meet a certain threshold. Moreover, many everyday SFC transactions include goods and services which are neither expensive nor dangerous. This implies that the relevant worst case scenario will probably not involve a personal injury and will usually not meet the necessary threshold to induce alertness and precaution taking.

The end point of this observation is that all of these possible explanations as to consumers' hardship in evaluating low-probability risks establish a greater need to relax the assumption of rational risk perception by consumers. This, in turn, might suggest

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75. *See* Langevoort, *supra* note 10, at 1504.
76. *See, e.g.*, Camerer & Kunreuther, *supra* note 69, at 570, 580.
77. *Id.*

that, at least under some circumstances, the law should better protect consumers who face contractual terms that address low-probability non-salient risks.[78]

B. Availability Cascades

One cause that can make low-probability risks patent is availability, which is a factor of both observed frequency and salience.[79] In this context, the availability cascades suggest that "people tend to think that risks are more serious when an incident is readily called to mind or 'available.'"[80] At the same time, this bias also predicts that people tend to underestimate or ignore risks that are not "available."[81]

Availability has a direct effect on consumers in many fields of commerce and in various decision making situations. Going back to the example of insurance, for instance, it appears that flood insurance is purchased mainly by individuals who have experienced flood damage in the past or by people who are

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78. This concern raises the fundamental tension between respecting individual choices (including irrational ones) on one hand, and governmental interference in the private sphere in order to promote efficiency (or other values) where market forces do not reach an optimal equilibrium on the other. For a discussion of product liability as a response to consumer misperception of risks, see Spence, *supra* note 66. For behavioral law and economics writings that address paternalism from various perspectives and plausibly argue that at times paternalism is warranted, inevitable or even desired, see generally Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case of "Asymmetric Paternalism"*, 151 U. PA. L. REV. 1211 (2003) (arguing in favor of asymmetric paternalism, which creates large benefits for those who make errors while imposing little or no harm on those who are fully "rational"); Rachlinski, *supra* note 18; Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1187–88 (2003) (articulating the idea that paternalism is inevitable while explaining why libertarian paternalism is both possible and legitimate).

79. *See, e.g.*, Jolls et al., *supra* note 17, at 1519.

80. Sunstein, *supra* note 20, at 5.

81. *See, e.g.*, Amos Tversky & Daniel Kahneman, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 68, at 13 ("[T]he risk involved in an undertaking may be grossly underestimated if some possible dangers are either difficult to conceive of, or simply do not come to mind.").

familiar with others who have had such experiences.[82] Similarly, media reports about dramatic death causes—such as fire and homicide—lead people to believe, erroneously, that some causes of death are much more frequent than they really are.[83] Operative consumption decisions, such as getting smoke detectors (with respect to the risk of fire), or purchasing weapons for self-defense (with respect to the risk of being a victim of crime) are likely to be among the typical responses that many individuals make due (at least in part) to the availability cascades.

Since it is easy to remember conspicuous occurrences, people tend to attach more weight to low-probability events once they can easily imagine or otherwise generate similar or correlating examples. As a result, people overestimate the low-probability though "special" or salient events (that are likely to come into mind), while underestimating the "regular" or non-salient ones (which do not occupy much of their thought and attention).

With this background in mind we can better realize why consumers are likely to ignore or underestimate the risks they regularly take upon themselves when entering SFCs. Since people tend to underestimate the "regular," non-salient, frequent risks, consumers are likely to devalue risks that SFCs allocate to consumers. Those (many) consumers who have not experienced past disputes over standardized contract terms might not have "available" occurrences capable of engendering better alertness.

There is another reason that leads consumers not to easily recall past occurrences with respect to SFC terms. Many consumers mistakenly do not attribute previous discrepancies to contractual terms. It seems that there are many instances where disputes over contractual terms and conditions are viewed by consumers in the abstract, without realizing that the genuine source of such disputes is a standardized contractual provision.

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82. *See, e.g.*, Herbert Simon, *Rationality in Psychology and Economics*, 59 J. BUS. S209, S215–16 (1986).

83. *See, e.g.*, Camerer & Kunreuther, *supra* note 69, at 569 (referring to a study that demonstrates that "[p]eople perceive the likelihood of deaths from highly reported disasters such as fires and homicide to be higher than those of events such as diabetes and breast cancer. But the two diseases together actually take twice as many lives as the two more dramatic events.").

Perhaps an example will clarify. Many travelers focus on price terms and thus shop for the lowest fare price they can find. In most cases, the agreements that accompany lowest fare price quotes restrict the purchaser from changing his travel dates. Consumers who buy a relatively cheap ticket and later find it hard or expensive to change their trip dates are not likely to fully realize that the problem is created by an SFC provision that allocates risk among the contracting parties. It is thus common to hear those disappointed consumers complaining about the carrier's "strict policy," "lack of flexibility," "unfairness," "lack of understanding," "lousy customer service," "unreasonableness," and so on. It is quite rare for those aggrieved customers to associate the problem with a standardized term they supposedly agreed upon when purchasing the ticket.

Moreover, whether or not an event or a risk will become salient depends greatly on the way in which influential groups—such as the media, interest groups, and politicians—handle and treat possible events and potential risks.[84] These groups can control and manipulate public concerns, attention, and opinions.[85] Accordingly, the fact that important social actors (such as the media and politicians) are uninterested in the problems that consumer contracts generate (and at times might even have conflicting interests)[86] contributes to the fact that the risks that are

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84. *See, e.g.*, Kunreuther et al., *supra* note 70, at 2 ("Disasters, such as the explosion at the Union Carbide plant in Bhopal, India in 1984, have sensitized the public to the potential dangers from chemical facilities even though the likelihood of such accidents is extremely small. This concern with the impact of major accidental chemical releases can be illustrated by congressional passage of the Clean Air Act Amendments (CAAA) of 1990.").

85. *See* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999).

86. *See, e.g.*, Elizabeth Warren, *The Over-Consumption Myth and Other Tales of Economics, Law, and Morality*, 82 WASH. U. L.Q. 1485, 1507 (2004) (arguing that the myth of over-consumption serves high interest credit card issuers and sub-prime mortgage lenders, and noting that "[i]f millions of Americans believed that families were losing their homes and they were left to cope with repo agents and aggressive bill collectors because they have been fleeced *by deceptive marketing and oppressive contract terms*, then the regulations that support billions of dollars of profits in the consumer credit industry could be easily changed" (emphasis added)).

usually allocated via SFC clauses are not made salient to most consumers.

C. Self Serving Biases

As noted above,[87] risk misperception owing to an error in risk assessment is only one important aspect in potential misperception of consumer contract terms. People may have accurate and adequate information with reference to a given risk but nevertheless under-react to it.

Various reasons lead consumers to under-react to contractual risks. As for an example, they might be willing to face certain risks due to an unrealistic belief in their immunity from harm (i.e., the "it cannot happen to me" attitude).[88] Self-serving biases, such as overoptimism and overconfidence, capture this course of thinking.

People are unrealistically optimistic with respect to many important aspects of their lives. The vast majority of people "believe that their own risk of a negative outcome is far lower than the average person's."[89] Most people believe they are less likely than others to suffer from automobile accidents, heart attacks, smoking diseases, and other health risks.[90] Similarly, people often display an unrealistic optimism or overconfidence concerning their general ability, skills, and personal as well as professional success.[91]

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87. *See supra* text following note 69.

88. Sunstein, for example, uses this insight to support "a form of anti-anti-paternalism." Sunstein, *supra* note 20, at 3 ("If people are unrealistically optimistic, they may run risks because of a factually false belief in their own relative immunity from harm, even if they are fully aware of the statistical facts. And if people's choices are based on incorrect judgments about their experience *after choice*, there is reason to question whether respect for choices, rooted in those incorrect judgments, is a good way to promote utility or welfare.").

89. Jolls et al., *supra* note 17, at 1541.

90. *See, e.g.*, Neil Weinstein, *Optimistic Biases About Personal Risks*, 246 SCI. 1232 (1989).

91. *See, e.g.*, Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439 (1993).

Being optimistic is generally a positive human trait.[92] As Langevoort explains, "[e]xcessive optimism and an illusion of control over the future . . . may be seen as mechanisms to relieve stress and anxiety and produce more aggressive, persistent behavior (thereby leading to greater success)."[93] While there are good, understandable grounds for self-serving biases, if people systematically believe that they are relatively risk-free, then policy concerns might be justified.

In the context of consumer contracts, overoptimism can be an important factor in a consumer's decision to waive his or her legal rights (e.g., the right to launch litigation) or to undertake some legal risks (e.g., waiving seller's legal responsibility for his own negligence). If consumers were able to objectively evaluate their risk exposure, they would probably be more careful before accepting such contractual clauses and more reluctant to be legally bound by them.

The problem of over-optimism becomes even more acute when considering the overconfidence bias. This bias suggests, *inter alia*, that people tend to overestimate their ability to predict outcomes.[94] Thus, unrealistic optimism, especially when combined with overconfidence, posits a serious challenge to the assumption that consumers as a class are able to properly evaluate and efficiently respond to the risks that SFC terms allocate.[95]

Furthermore, probability judgments interact with, and are influenced by, the desirability of potential outcomes. For instance, people tend to ignore or degrade prospects of future unpleasant situations, such as car accidents or property destruction due to an earthquake, even when they obtain accurate statistical information

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92. *See* Rachlinski, *supra* note 18, at 1172 (noting a strong correlation between self-serving biases and well-being, and pointing out that "[o]nly those who suffer from clinical depression . . . have realistic self perception").

93. Langevoort, *supra* note 10, at 1506.

94. *See* Rachlinski, *supra* note 18, at 1173 ("Over-confidence in one's own judgment magnifies the undesirable consequences of erroneous judgment. . . . Excess confidence impedes individuals' ability to learn from mistakes and improve their ability to make better decisions.").

95. *Compare* Hillman & Rachlinski, *supra* note 43, at 454 (linking over-optimism to voluntary acts and stating that "[b]ecause consumers voluntarily enter into contracts, they will tend to believe that they can also sagely discount the low-probability events covered by standard terms").

regarding such specific hazards. At times, also, people tend to avoid confronting unpleasant information.[96] Therefore, people might refrain from obtaining information with relation to some risks due to the negative nature of the potential knowledge and what it may imply.[97]

Obviously, SFCs typically contain clauses that refer to future unpleasant situations. Contractual terms that address payment defaults and legal disputes are prominent examples. Therefore, the general tendency toward ignoring (or heavily discount) unpleasant prospective contingencies can further distort consumers' risk perception with respect to SFC terms that deal with such disagreeable circumstances.

A specific example can help further clarify this point. Recall for a moment the case of *Williams v. Walker-Thomas Furniture Co.*, where the purchaser agreed that all payments shall be credited pro rata on all outstanding leases, bills, and accounts.[98] Even assuming that the buyer is equipped with the proper education and mental capacity necessary to understand the meaning of such a term, overoptimism might prevent him from fully appreciating the risks he faces by adhering to it. One's evaluation of default in payment is directly related to one's success and wealth, especially when we keep in mind that self-serving biases correlate with the desirability of prospective outcomes. The application of these behavioral biases to the *Williams* case suggests that the purchaser might have been susceptible to overoptimism in its strongest form.[99]

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96. See source cited *supra* note 38 and accompanying text for the discussion regarding cognitive dissonance.

97. For an argument that people also tend to over-estimate the chances of what they perceive to be a positive occurrence, such as winning the lottery see, for example, Camerer & Kunreuther, *supra* note 69, at 578.

98. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 447 (D.C. Cir. 1965); *supra* note 60 and accompanying text.

99. *See* Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1432 (2004) (suggesting that underestimation due to the optimism bias might have affected Williams' ability to understand the relevant provision: "Due to the underestimation bias, Williams may have been insufficiently sensitive to the inclusion of the repossession clause"; and opining that "arguably, the seller designed the installment purchase contract to exploit buyers' behavioral biases . . . . Williams was lured in by the attractive purchase price, only to face later the

This analysis emphasizes the complex interaction between the different (yet related) failures discussed in this part. Clearly, the combination of these failures can raise serious concerns. Many contract clauses, especially those that govern possible legal conflicts or payment defaults, are vulnerable to different and various failures at the same time. Such terms address low-probability risks; they deal with unpleasant potential situations; they are likely to be discounted due to self-serving biases; and they do not enjoy a high degree of public attention or salience, which makes them even less likely to become available.

D. Consumption Culture

Finally, people are inclined to discount future risks and rewards, employing a bias toward current spending and consumption while discounting or ignoring deferred satisfaction.[100] Closely related, people are "impatient about the near future and myopic about the distant future."[101] For example, it is widely agreed that American families nowadays spend more and save less.[102]

These general consumption practices make the issue of SFC risk perception even more problematic. Consumers might not take the necessary precautions when facing a future risk incorporated in an SFC they face due to a present-consumption ideology or

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threat of repossession."); *see also* Eisenberg, *supra* note 71, at 241–42 (noting that from a seller's perspective, consumers' over-optimism and overconfidence can justify incorporation of harsh protective terms, anticipating the need for a strong form of security, but that on the other hand, sellers take advantage of these biases by tempting buyers to enter into deals beyond their financial ability).

100. Langevoort, *supra* note 10, at 1505.

101. Camerer & Kunreuther, *supra* note 69, at 579.

102. *See, e.g.*, Warren, *supra* note 86, at 1489 and accompanying figures 3–6. Although Warren believes that over-consumption is a myth, she surveys data that supports the statement that "families are not just spending more of what they earn, they are also spending what they have not earned. Over the space of a single generation, American families have transformed from a nation of savers to a nation of spenders." *Id.* at 1489.

preference.[103] This phenomenon deserves a more thorough examination, analyzing its relation not only to risk perception but also to the more general idea of consumers' bounded will power and the proper ways for policy makers to respond.[104] For our purposes here, however, suffice it to note that the stronger the consumption culture and ideology, the more likely it is that laypeople will not fully acknowledge the risks they face by accepting SFC terms.[105]

To conclude this part of risk perception and evaluation, general cognitive failures distort the ways in which consumers evaluate SFC terms and the risks they present. As a result, individuals may have difficulties in pricing contractual provisions. This aspect is probably in one of its most acute forms in the context of consumer contracts. Whereas trained or sophisticated contracting parties might have the incentive, ability, and opportunity to learn to correct some of these cognitive biases and mistakes, most consumers, as unsophisticated one-shot players, are unlikely to gain this kind of experience and expertise.[106]

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103. *See* Camerer & Kunreuther, *supra* note 69, at 573 (noting that in research conducted in Pennsylvania and New York, more than 70% of motorists participating in a survey said they would not purchase an automatic seat belt that cost $100 if this would decrease their annual insurance premium by $25; and reasoning that the drivers' reluctance could be attributed, *inter alia*, to high discounting of future benefits).

104. For such an analysis of how bounded will-power and the over-optimism bias may undermine consumers' rationality, see Bar-Gill, *supra* note 99, at 1432.

105. By using the term "consumption culture and ideology," I refer to the urge to consume and to the cultural importance that people commonly attribute to consumption. As noted, one might argue that this reflects, at least in part, bounded will power. I believe that the two bounds are interrelated here. Strong consumption habits and ideology might undermine one's ability to approach and evaluate transactions in a "rational" way. *Cf.* Bar-Gill, *supra* note 99, at 1400 ("Of course, the optimism explanation and the imperfect willpower explanation . . . reinforce one another.").

106. The implicit assumption here is that repeating an experience can help individuals to correct or minimize at least some cognitive mistakes. However, there is a serious debate over whether facing repeated decision tasks provides people with the adequate feedback to improve their ability to avoid cognitive biases and thus improve the quality of their decisions. *Compare, e.g.*, Langevoort, *supra* note 10, at 1521 (presenting a relatively skeptical view), *with* Rachlinski, *supra* note 15, at 757 (presenting a somewhat more optimistic view

IV. EMOTIONAL STRESS AND CONSUMER HARASSMENT

Pressure and stress[107] might disrupt optimal decision making.[108] When individuals encounter a sufficiently high degree of stress, they are likely to fail to optimally consider their options and actions.[109] This is not to say, however, that pressure and stress will *inevitably* degrade decision quality. Quite to the contrary, people need some degree of stress in order to behave optimally when making decisions. A moderate amount of stress can be constructive for efficient decision making.[110]

This part seeks to explore how the surroundings and settings of some typical SFC transactions influence consumers' decision making. The first section of this part provides the general theoretical background necessary for understanding the arguments made thereafter. In the second and third sections I apply the relevant insights to offline and online consumer transactions governed by SFCs.

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that "feedback is a pre-requisite for learning" but conceding that "novices in a field or one-shot players are unlikely to have had enough experience to have received adequate feedback"). Obviously, different biases require different debiasing techniques, and the success rate and efficiency of each technique vary substantially.

107. As employed by psychologists, the term "stress" is used to describe unpleasant emotional states that result from threatening environmental events. *See generally* IRVING LAW JANIS & LEON MANN, DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT 50 (1977).

108. *See id.* at 45 ("[P]eople are likely to regret in leisure the impulsive decisions they make in haste while undergoing emotional turmoil.").

109. *See, e.g.*, Peter Wright, *The Harassed Decision-Maker: Time Pressure, Distraction, and the Use of Evidence*, 59 J. APPLIED PSYCHOL. 555, 560 (1974) (exploring the affect of noise and time pressure on individuals' tendency of "becoming extremely alert to discrediting evidence on a few salient dimensions").

110. *See* JANIS & MANN, *supra* note 107, at 62 (specifying four conditions for vigilant decision-making).

A. The Theoretical Background

To describe the various reactions that people are likely to display when encountering decisions that involve different levels of stress, psychologists have developed the conflict model.[111] This model proposes some interesting predictions, three of which I find to be relevant to our discussion of consumer SFCs.

First, the conflict model predicts that where the decisionmaker suspects she does not have the necessary time to gather and analyze the important information she would otherwise like to obtain, high pressure can lead to "hypervigilance," where individuals are likely to choose the most readily available option.

Second, the model suggests that where a decision has to be made within a short timeframe (i.e., the decision cannot be postponed) and the decisionmaker doubts his ability to improve his decision by obtaining additional information, a high degree of stress can lead to "bolstering"; where, again, the decisionmaker will choose the most available alternative.

Third, the conflict model predicts that where people think that the decision they face is not a risky one, they will have a weaker incentive to pursue information. As a result, people in no-stress situations tend to be more passive and to invest less efforts in gathering information and reaching optimal decisions.

B. Consumer Contracts Settings

Generally speaking, the legal literature that deals with consumer transactions via SFCs does not invoke the terminology of the conflict model and its predictions. Yet, the observation that consumers find themselves entering transactions or signing SFCs under stress and pressure is not a novel one, as it has been applied previously in a few, limited contexts.

A very common context that demonstrates the need to protect consumers who enter transactions under unfavorable conditions and stress is that of the door-to-door sale. Generally speaking, a door-to-door sale (which is sometimes referred to as a "home solicitation transaction") occurs whenever a consumer is being

111. *Id.* at 45–134.

solicited to purchase goods or services at a private residence (or in a place other than the regular seller's business site).

Recall that according to the conflict model, people who decide under time constraints (common in door-to-door sales) tend to choose the most available option. When it comes to door-to-door transactions, time pressure, emotional manipulation, the inability to consider other alternatives, and, at times, the desire to get rid of the salesperson, may all result in a situation where the most available option for the consumer would be to enter the transaction and purchase the offered product.[112]

And indeed, it has been widely acknowledged by a variety of legislatures that in typical door-to-door transactions, many consumers might not reach optimal decisions because of time limits and emotional stress.[113] Accordingly, many states have enacted statutes allowing consumers a "cooling off" period after entering transactions in which they are not likely to have had adequate time for reflection. During these "cooling off" periods, consumers are permitted to cancel door-to-door sales contracts.[114]

Another significant example of the need to protect consumers from entering transactions under unfavorable emotional conditions arises in the context of home purchases, which calls to mind the second prediction of the conflict model. Purchasing a home, which is considered, in general, to be the most important transaction that most individuals make during their lifetime,[115] can generate a considerable amount of stress. In an early application of the

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112. *See generally* Sunstein & Thaler, *supra* note 78, at 1187–88 (attributing successful door-to-door transactions to consumers' bounded rationality and bounded will-power).

113. *See, e.g.*, Texas Attorney General, The Consumer Protection Door-to-Door Brochure, http://www.oag.state.tx.us/AG_Publications/txts/door.shtml (last visited Sept. 17, 2007) ("Be suspicious of anyone who tries to sell by playing on your emotions. For example, some sellers will suggest you are shirking your responsibilities to your family if you don't buy their product.").

114. *See, e.g.*, Door-to-Door Sales Protection Act, N.Y. PERS. PROP. LAW §§ 425–31 (2007); *see also* 16 C.F.R. § 429.1 (2007) (in which the Federal Trade Commission imposes a mandatory three days cooling-off period as well).

115. *See, e.g.*, Warren, *supra* note 86, at 1495–99 (opining that a home purchase is not only "the single most important purchase for the average middle-class family" but that home prices are the most dominant factors that lead American families to substantial financial difficulties).

conflict model to home sales law, Eskridge argues that: "the high stakes and the overwhelming complexity of the [home purchase] transaction will paralyze many homebuyers' desire to shop for the best deal . . . . The complex factors involved discourage all but the most confident and knowledgeable shopper from a thorough search."[116]

Recall that according to the second prediction of the conflict model, if the decisionmaker doubts his ability to improve his decision by obtaining additional information, he will choose the most available alternative. As Eskridge explains, this insight might underscore a need for protecting consumers in the context of house sales.

In this part, I assert that the predictions proposed by the conflict model and other experiments documenting the results of unfavorable conditions on decision making should be extended to consumer SFCs much more broadly. In many cases, the surroundings that accompany SFC transactions can seriously undermine consumers' aptitude to make optimal decisions. Clearly, and as will be detailed next, the combination of stress, pressure, and emotional manipulation is quite unique (though not exclusive) to the SFC offer and acceptance. In most other contractual relationships—especially those that involve two firms (or two individuals) that contract with one another, such dynamics are not expected to repeatedly play a crucial role. The next paragraphs attempt to provide a more thorough analysis of this issue.

1. Time Limit and Noise Distraction

At times, courts have acknowledged that consumers may enter SFCs under unfavorable conditions. Broadly speaking, when dealing with consumers' claims of emotional stress, courts have frequently invoked the notion of "contract of adhesion," the "reasonable expectation" principle, or the unconscionability

116. William N. Eskridge, *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction*, 70 VA. L. REV. 1083, 1116 (1984).

doctrine.[117] Nevertheless, courts lack a systematic vision of why, how, and when stress is a relevant factor in consumer contracts cases. The examination below seeks to fill some of this gap.

As the conflict model and other empirical experiments suggest, time limits are key factors that might create stress in decision making. Many SFCs are likely to be signed under time pressure. Some of the everyday examples that may illustrate this typical situation are transactions involving car rentals, parking lots, theater tickets, dry cleaning services, and so on.[118]

Consumers are often rushed by sellers to sign SFCs without reading them first and without being allowed sufficient time for careful deliberation.[119] Moreover, evaluating form contracts requires considerable time and mental investment since those contracts typically incorporate many terms[120] and use legal jargon extensively. The combination of time pressure on one hand, and the amount of time necessary for carefully reading an SFC on the other, minimizes the chances that consumers will end up reading the standardized terms to which they adhere.

Whereas time constraint is one important factor that can yield a negative effect on consumers' attitude toward SFCs, the possibility of a noisy environment and loud distractions is another key aspect. On many occasions consumers are asked to enter contracts in a noisy setting, while there are other customers waiting for service. This is tackled next.

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117. *See, e.g.*, Broemmer v. Abortion Servs. of Phoenix, Ltd., 840 P.2d 1013 (Ariz. 1992) (invoking the notion of "adhesion contract" and the "reasonable expectations" principle).

118. *Cf.* Eisenberg, *supra* note 71, at 242 ("[F]orm takers often encounter form contracts under circumstances that encourage the form taker to exert only minimal effort to understand the preprinted form. Few hurried travelers, for example, will pause to read the boilerplate provisions of their car rental agreements.").

119. *See* Hillman & Rachlinski, *supra* note 43, at 448 ("Businesses often present standard-form contracts at a moment when consumers are hurried and when stopping to read and understand the boilerplate will feel awkward or unpleasant . . . .").

120. *See generally* Claire A. Hill & Christopher King, *How Do German Contracts Do as Much with Fewer Words*, 79 CHI-KENT L. REV. 889 (2004) (arguing that American contracts are particularly long and detailing possible reasons for this phenomenon).

2. Other Consumers and Seller's Attitudes

From a consumer's perspective, the attitude exhibited by other buyers might aggravate the situation. It is not uncommon to see other customers display nervousness (or even impatience) toward those exceptional buyers who insist on reading the SFC they enter or on bargaining over the pre-drafted terms.[121] Naturally, most consumers would prefer avoiding these predicted responses by quickly signing (or otherwise accepting) SFCs.

While other buyers' attitudes toward reading consumers is one notable feature in creating unfavorable conditions, sellers' attitudes toward them is another important source of stress. Everyday experience teaches us that many sellers tend to demonstrate (sometimes explicitly) their uneasiness with consumers' request to read, let alone negotiate or change, SFCs. As is shown next, sellers' discomfort toward reading consumers can be explained in various ways.

One plausible explanation for sellers' uneasiness toward consumers who ask to read or change SFCs is sellers' tendency to view such requests as an expression of distrust.[122] Since trust is an important dimension in our everyday interactions, acts that display distrust are likely to encounter negative reactions. Buyers, therefore, are expected not to read SFCs in order to refrain from generating antagonism as well as to maintain their own self-perception of trust, conformity, and cooperation. Crafty sellers who are aware of this natural human trait might exploit it.

This is not the only plausible rationalization for seller's impatience toward reading consumers. Interestingly, a seller's impatience can also be attributed to his own anxiety. A seller might fear that reading consumers, as a class, are likely to be sophisticated buyers. Those buyers, it can be anticipated, are more likely to reveal assertiveness or aggressiveness in the course of their commercial interaction. From a seller's perspective,

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121. I will use the term "reading consumers" when referring to this group of consumers.

122. *See* Hillman & Rachlinski, *supra* note 43, at 448 ("Consumers will feel uncomfortable suddenly indicating distrust to the reassuring agent by studying terms covering unlikely events.").

generally speaking, it would be a natural response to avoid this type of buyer, or at least to display nervousness toward them.

It is also important to recall that SFCs are usually presented by sellers' agents who have only limited (if any) legal expertise. In most cases, those corporate agents are not trained to address legal problems and concerns. Hence, salespeople may fear that reading consumers will raise questions that are beyond the scope of their knowledge. Furthermore, sellers' agents typically lack the power to change the substance of the contracts they offer to potential clients.[123] In this respect, facing one's own lack of knowledge or authority is likely to generate uncomfortable feelings. Since most people would prefer to avoid such feelings, sellers' understandably form—whether consciously or not—a negative attitude toward reading consumers.

Thus, businesses establish the contracting environment in a way that leads consumers to believe that reading form contracts is actually wasting others' time.[124] Where sellers associate reading consumers with a highly likelihood of wasted time, they will also associate them, as an inevitable result, with loss of potential revenues. Those buyers who pay attention to standardized terms are likely to consume more time in the process of shopping and negotiating.[125]

Moreover, reading consumers might as well hamper sellers' efforts to create a commerce-friendly atmosphere. Arguing over preprinted terms is costly for sellers not only intrinsically, but also in the form of lost sales. Disputing contract terms may create a general atmosphere of confrontation. This, in turn, can negatively affect other customers' willingness to interact with the business

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123. *See, e.g.*, Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 600 (1990); Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 AM. BUS. L.J. 193, 227 (1998) ("If the consumer has questions on a contractual term [in a form contract], the corporate agent, perhaps a relatively untrained salesperson, may not understand the language nor have the power to alter it.").

124. *See* Hillman & Rachlinski, *supra* note 43, at 448 ("At the very least, the business's agent may send signals that he is in a hurry.").

125. As noted, this is perceived to be a waste of time, especially since sellers' agents are usually not authorized to dicker over standardized terms. *See generally, e.g.*, Ostas, *supra* note 123.

and its representatives, since other consumers might become more suspicious and reluctant to enter the contract at stake. Hence, by voicing concerns with respect to contractual provisions, reading consumers decrease the prospects that new customers will enter an SFC, and, as a result, increase sellers' overall transaction costs.

The physical proximity between buyers and sellers is an additional point that ought to be acknowledged in listing the potential sources of stress and pressure from consumers' perspective. In many cases, physical proximity between buyers and sellers can make it even harder on consumers to calmly consider their acts and carefully deliberate the contracts they face. This is so since people need a minimum degree of isolation or private space for making level-headed decisions. It can be an unpleasant experience for a buyer to read an SFC while the form giver is (literally) closely looking at her, inspecting her reactions, and at times displaying impatience. This further exposes buyers to possible emotional manipulation by sellers.

Clearly, many different factors interact in causing buyers stress and pressure. The various factors that can lead consumers to experience stress and pressure make it important to discuss the predictive value of the conflict model and the related literature that deal with time pressure and other sorts of potential distractions. This is especially important, since people have diverse characteristics and different ways of coping with stress and pressure. Thus, it is impossible to *accurately* predict the level of stress that consumers are likely to encounter in *every* individual case (and, likewise, the amount of stress that any given consumer will experience).

Nevertheless, some vital insights can be derived as the set of observations described in this section is likely to be true for consumers as a *class* (that is, notwithstanding one's character and preferences). As an extreme example, it is fairly straightforward that regardless of one's personality, the sense of stress and pressure that accompanies a home sale transaction is not to be compared with the one experienced when purchasing sporting event tickets at the stadium box-office. And neither should be compared with entering a contract with a local dry-cleaning service for cleaning one's clothes.

Therefore, the importance that people attribute to their decision and the amount of stress and pressure they are likely to encounter are dictated by numerous factors. In this context, the observation that entering a home sale contract creates much more stress than entering a dry-cleaning contract should not be understood as suggesting that the amount of stress is dictated only by (and is in correlation only with) the amount of money which is at issue. Financial commitment is merely one factor (though it is obviously an important one). Renting a car in a foreign airport, for example, might be a very stressful experience—disproportionate to the amount of money involved.

Thus, the degree of stress that consumers face when entering a contract varies substantially from one case to the other. The time spent while waiting in line, the salesperson's attitude, the number of people in line, the general environment where the transaction takes place, and other context-dependent aspects (such as the amount of money involved) are just some of the features that determine the amount of stress and pressure that consumers might experience when accepting an SFC.

Despite this relative indeterminacy, the bottom line should be clear: Under unfavorable conditions and emotional stress, which ordinarily accompany many of our everyday consumer transactions, people typically make their decisions less carefully. Stress, pressure, and consumer harassment can lead people to enter SFCs without ample consideration. Under such conditions consumers are less inclined to read the contracts they enter. This provides a possible reason as to why the act of entering a form contract should not be automatically considered a manifestation of consumers' optimal deliberation and utility maximization. In many cases, the default assumption should be quite to the contrary.

C. Online Consumer Transactions

While different types of transactions result in different levels of stress, it is argued that some contractual settings do not create even a minimal sense of emotional discomfort and excitement. "Rolling contracts" (where consumers receive the full contract only with the

merchandise)[126] and online ("clickwrap" and "browsewrap") agreements are typical transactions where one might plausibly argue that the act of contracting via SFCs entails no stress and involves no inherent environmental disadvantages. In such cases, generally speaking, consumers are free from the burden of communicating with the other party.

Hillman and Rachlinski suggest that, "[e]-consumers can shop in the privacy of their homes, where they can make careful decisions with fewer time constraints. They can leave their computers and return before completing their transactions, giving them time to think and investigate further."[127] Accordingly, one might argue that the virtual e-commerce environment provides a better alternative to real world transactions insofar as stress and time constraints are issues. The e-commerce setting does not involve any interaction with manipulative sellers; other buyers are not part of the regular shopping experience; noisy environment is not an intrinsic part of electronic contracting; and time pressure does not exist in most cases. At least on the face of it, consumers in electronic standard form contracting do not encounter the hostile pressure and stressful conditions that sometimes exist in real world contracting.

This assertion in favor of the e-commerce contracting environment can be criticized from two very different perspectives. First, it can be argued that, in some other respects, the features of internet contracting might increase stress, rather than alleviate it. Being able to communicate with salesmen (and people in general) has some important positive attributes. For instance, in a real world transaction the presence of a seller makes the other contracting party visible. In addition, real world sellers can reassure consumers that the contract they are entering is a

126. *See* source cited *supra* note 36 and accompanying text.

127. Hillman & Rachlinski, *supra* note 43, at 478; *see also id.* at 480 ("Indeed, perhaps the most obvious difference between electronic and paper contracting is that, in the paper world, salespeople usually deal with consumers face to face, whereas electronic consumers transact business from the privacy of their homes or offices. All of the social factors that deter consumers from reading standard terms depend upon the influence of live social situation that electronic contracting lacks. E-businesses cannot easily duplicate the effects of an endearing, but manipulative, agent in the electronic format.").

reasonable one. Regardless of the accuracy of such a claim, that might help diminish consumers' anxiety. Last, the fact that other consumers are interacting with the business might serve for the individual consumer as a signal of reasonableness, thus providing some kind of collective relief.

By contrast, when it comes to e-commerce contracting, consumers might be on alert because of other features of the internet setting. When entering SFCs online, consumers might experience anxiety due to privacy concerns, fear of identity theft, uncertainty as to whom they are contracting with, as well as uncertainty as to when and how the transaction is to be concluded. Moreover, an online consumer might feel some sense of discomfort since he is left to his own devices, without fellow consumers with whom to discuss the transaction at hand.

Second, even if we accept the premise that e-contracting might, under proper circumstances, reduce the stress and lessen many of the unfavorable conditions created by human interaction in regular circumstances, it is yet necessary to consider the third prediction proposed by the conflict model. Recall, that this prediction suggests that no risks and no stress can actually *undermine* optimal behavior and decision making. In consequence, those e-commerce circumstances which do not involve stress might result in sub-optimal information gathering with regard to that SFC for the very reason that it does not give rise to a stressful situation.[128] This is perhaps especially true if by the time that the online consumer has reached the stage where she enters a contract, she has already exhausted most of her patience and cognitive ability (which were used in order to reach the decision to purchase the specific item or service).[129]

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128. This argument against e-commerce invites strong opposition. As before, one general objection is the one of anti-paternalism. Yet there is a strong intuition that a distinction should be drawn between protecting consumers from pressure and stress caused by sellers (who can manipulate consumers and profit from their mistakes), and protecting consumers from their own indifference arising from common behavioral patterns. Although this concern accompanies much of this Article's analysis, the "no pressure" argument raises strong doubts that should be carefully considered.

129. *See* source cited *supra* note 36 and accompanying text (relating this reality to the problem of sunk cost and cognitive dissonance); *see also* Eskridge,

Though this argument must be taken seriously, it should not be taken too far. At this point one might wonder whether this allegation against the e-commerce environment does not make it almost impossible to attach a rational assent to consumers' decision to enter almost any SFC. If we adopt the premise that stress, as well as lack of it, can be harmful for deliberate decision making, it might then be natural to question under what circumstances consumers are *not* in a need of vigorous protection.

However, this is not an accurate understanding of what the argument contends. Many consumer decisions create some level of stress, excitement, or alertness. Concerns are justified only in those exceptional cases that involve *excessive* stress or *nearly absolute* lack of it. Thus, the assertion that some of the circumstances surrounding e-commerce diminish the minimum sense of alertness (necessary for an optimal decision making) should be carefully established.

The argument that e-commerce environments may over-relax consumers to the point that they should not be presumed to behave rationally becomes more plausible once we consider some of the distinct features of e-commerce. I will give particular attention, in this regard, to the fact that consumers usually need not sign their names in order to enter online transactions.

Contracting parties can signal their acceptance of a contract's substance to one another in various ways.[130] One prominent way is by signature. There are many different types of legally binding signatures,[131] and some do not require ink and paper.[132]

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supra note 116, at 1116 (making a similar argument to explain why home buyers are less inclined to shop for mortgage loans and related expenses).

130. *See, e.g.*, U.C.C. § 2-206 cmt. 1 (Supp. 2006) (adopting a similar approach and rejecting technical rules of acceptance); RESTATEMENT (SECOND) OF CONTRACTS § 30(2) (Supp. 2007) ("Unless otherwise indicated . . . an offer invites acceptance in any manner and by any medium reasonable in the circumstances.").

131. *See, e.g.*, Mark Lewis, *Digital Signatures: Meeting the Traditional Requirements Electronically: A Canadian Perspective*, 2 ASPER REV. INT'L BUS. & TRADE L. 63, 66 (2002) ("Canadian and American courts have held that signatures include names on telegrams, telexes, typewritten names, letterheads, and faxed signatures." (footnotes omitted)).

Nevertheless, most people perceive a regular (ink) signature to be the most solid, binding, and powerful technique of contract acceptance.[133] Thus, in most cases contracting parties sign their agreements in order to validate them and convey a signal of legal obligation.

Clearly, a consumer's signature on a contract is a powerful, legally binding act.[134] Signing a contract is probably the most common mode of contractual acceptance, especially among ordinary consumers and laypeople.[135] A personal signature, using paper and ink, is a form of personal symbol.[136] Accordingly, from the consumer's perspective, signing a contract can be an act that generates some sense of awareness or importance.[137]

Yet, and contrary to most real world transactions, e-commerce does not generally require consumers to sign their name or type their initials when entering a contract.[138] Entering a contact on the

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132. *See* U.C.C. § 1-201(b)(39) (Supp. 2006) (defines the term "Signed" as to include "any symbol executed or adopted by a party with present intention to authenticate a writing").

133. *See, e.g.*, Anthony M. Balloon, *From Wax Seals to Hypertext: Electronic Signatures, Contract Formation, and a New Model for Consumer Protection in Internet Transactions*, 50 EMORY L.J. 905, 934 (2001) ("That a signature is the central formality in contract formation—particularly in a consumer transaction—cannot be overstated. Most consumers equate their signature with being bound to the terms of an agreement." (footnotes omitted)).

134. *See, e.g.*, Peter Meijes Tiersma, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CAL. L. REV. 189, 206 (1986) (noting that there are various ways to accept a contractual offer, and that, *inter alia*, "[a] party can accept an offer by affixing a signature to the contract").

135. This becomes even more evident when we recall that SFCs, which account for the vast majority of modern contracts, frequently require consumers' signatures.

136. *See* Balloon, *supra* note 133, at 934.

137. *See* Hillman & Rachlinski, *supra* note 43, at 480–81.

138. The Electronic Signatures in Global and National Commerce Act § 106(5) defines "electronic signature" to include an "electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." The Uniform Electronic Transactions Act § 2(8), 7A pt. 1 defines "electronic signature" as an "electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." *See generally* Julian Epstein, *Cleaning Up a Mess on the Web:*

web is fairly easy: In most cases, all the consumers have to do is double-click ("I agree" or "I accept"). In many cases, rolling down the screen where the terms are detailed or opening the relevant link where the contractual clauses are specified is not a pre-requisite for entering a contract by clicking "I agree."[139] Often, there is no explicit clarification that clicking "I agree" forms a legally binding contract.[140] Moreover, in some cases the web-page default is set to the "I agree" link, making it even easier for consumers to enter the online contract.[141]

As a result, consumers in the electronic commerce reality are less likely to attribute importance to merely clicking "I agree"[142] and thus are less likely to realize they have just entered a legally-binding contract. This assertion can be slightly restated by invoking the prediction laid out by the conflict model: Where no signature is required, consumers are likely to lack the minimum sensation of stress or excitement necessary to induce careful

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A Comparison of Federal and State Digital Signature Law, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 491 (2002) (analyzing the intersection between the two approaches to electronic signature). See also Balloon, *supra* note 133, at 933, who argues that this reality justifies some kind of reform. Balloon proposes that "[t]o make contract formation a more deliberate process, the law should require consumers to type their initials into boxes on the web page next to certain terms in the contract." *Id.* He assumes this can function, *inter alia,* as a method that "makes contracting more intentional," since "[i]nitialing makes consumers stop and think about what they are agreeing to, instead of the typical scenario in which a consumer haphazardly clicks buttons and links to complete the contracting process in the quickest manner possible." *Id.*

139. *Cf. id.* at 932 ("On the Internet, the terms of an agreement can be placed anywhere, with only an inconspicuous link alluding to the presence of the terms. . . . The law should not allow the terms of a contract to be so easily hidden.").

140. *See id.* at 935 ("[N]ew legislation should be passed that requires disclosure to a consumer that clicking a button on the Internet is legally equivalent to signing a name in a writing.").

141. Furthermore, some websites require the consumer to click a "continue" button in order to acquire the relevant service or merchant, without providing the consumer with any other alternative (aside from withdrawing the transaction at stake), and while noting that "[b]y clicking the Continue button you agree to the License Agreements and Privacy Policies for the software included." For one such example, see http://www.adobe.com/products/acrobat/readstep2.html.

142. *See* Hillman & Rachlinski, *supra* note 43, at 481.

shopping and information analysis. This means, in sum, that e-commerce consumers may enter SFCs without realizing the legal significance of their actions.[143]

The topic of electronic signature and e-commerce has been approached from a variety of perspectives, and much more should be said about it.[144] For the purpose of the analysis presented here, however, suffice it to say that simple and traditional methods can minimize the chances that consumers will enter e-commerce contracts without fully realizing the scope of commitment they take upon themselves when doing so. Requesting consumers to sign their names or initials when entering e-contracts (or mimicking real world signature in other ways) is one key factor that might alleviate some of this problem. Slightly modifying the e-commerce contractual setting in some other minor respects might be worthwhile as well.[145]

In summary, many typical consumer contracts are entered under unfavorable conditions and involve stressful surroundings. By the same token, other common transactions are entered in a very casual setting, where no stress is involved. This part argues that decisions made under either circumstance are typically made less cautiously. Excessive stress and pressure, or complete lack of it, can seriously undermine optimal contracting behavior and decision making.

Yet the analysis presented here should not be understood as suggesting that the law should invalidate or ban transactions that

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143. One might plausibly argue that this is mainly a transitional matter and that as times progress consumers will learn to better understand the new reality. This optimistic view has merit, but the transitional period might be long and the problems during this period can be substantially mitigated only if we pay close attention to them. Moreover, even if consumers will end up realizing the new reality, it might still be difficult for them to internalize its significance when sellers construct the contracting process in a way that does not generate alertness.

144. For a more complete yet very different analysis of online consumer SFCs, see Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. (forthcoming 2008) (focusing on the legal significance of the ex post-ex ante information flows that the online realm provides).

145. *See supra* notes 138–142 and accompanying text.

are entered under unfavorable conditions and emotional stress or those entered under no stress at all. This would be too far-reaching, inefficient, and destructive. Moreover, this is not to imply that modern consumer and contract law should consider irrelevant the fundamental principle of holding consumers accountable for their own decisions. Rather, the analysis of this part emphasizes the importance of contractual environment and its potential effect on the way consumers think, behave, and make decisions.

Unfortunately, courts and policymakers frequently fail to acknowledge this aspect of contract formation and its significance. At times, they over-rely on rational consumers and free market forces. The analysis here puts forward an additional reason why, under some circumstances, consumers' rationality with respect to the acceptance of SFCs should be carefully examined.

Most states within the United States have acknowledged some of these problems and have taken steps to better protect consumers. This has been done, for instance, with reference to door-to-door sales. Yet, door-to-door transactions are only one scenario in which consumers are exposed to sales tactics that involve emotional stress and manipulation and result in sub-optimal decision making. Consumers are still left without adequate protection in many other cases governed by SFCs.

V. INFORMATION OVERLOAD

The inherent hardship involved in evaluating contractual risks discussed above[146] becomes even more troubling once we consider consumers' tendency to focus solely on certain salient aspects of the transactions they enter. Typically, consumers focus their attention only on a limited number of patent attributes (most notably price, quality, appearance, and function) while ignoring most other characteristics.

This part deals with this phenomenon. Section A briefly details the basic relevant aspects of information search and disclosure theory. Thereafter, section B examines recent data and experiments as to consumer decision making strategies when

146. *See supra* Part III.

facing excessive information. It further considers the specific harms that excessive information can pose to consumers.

A. Information Search and Disclosure

A rational decisionmaker who seeks to maximize her utility is assumed to search for information up to the point where the search costs exceed the expected value of the information not yet revealed.[147] Undoubtedly, providing information is crucial for reaching optimal decisions and minimizing the negative effects of asymmetric information.

Yet two main allegations against information disclosure concerning consumers' bounded rationality should be noted here. First, as a general assertion, cognitive errors influence human choice in a way that "undermines the benefits of information disclosure," since, if "individuals make bad choices even when they have good information, then information disclosures and warnings are useless."[148] Second, behavioral analysis suggests that, in many decisional contexts, the slogan "the more the better" is completely invalid.[149] Moreover, under some circumstances excessive information might have negative consequences.[150] As explained below, this is especially true in the context of consumer SFCs.

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147. This is the traditional theory of consumer search behavior. *See, e.g.*, GEORGE J. STIGLER, THE THEORY OF PRICE 2 (4th ed. 1987).

148. Rachlinski, *supra* note 18, at 1177 (footnote omitted).

149. *See, e.g.*, Charles E. Davis & Elizabeth B. Davis, *Information Load and Consistency of Decisions*, 79 PSYCHOL. REP. 279, 279 (1996) ("While there may be a belief that 'more is better,' decision-makers often complain of 'information overload' or an inability to respond to the abundance of information available.").

150. This has been acknowledged by many legal institutions, including the U.S. Supreme Court. *See, e.g.*, Ford Motors Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980) ("*Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure . . . and the need to avoid [informational overload].'" (quoting S. REP. NO. 96-73, at 3 (1979)).

B. Information Processing and Consumer Contracts

Empirical studies demonstrate the assertion that people indeed encounter cognitive problems that can undermine their ability to process information accurately and efficiently. The general argument in this respect is that it is an impossible task to consider, absorb, and compare all the relevant data necessary for reaching an "informed" and "rational" decision in many consumer markets. Because human memory and cognitive abilities are not infinite, consumers cannot analyze and absorb *all* of a product's attributes.

Behavioral science scholars have been exploring and disputing the relevance of information overload and its influence on consumers' ability to shop efficiently by accumulating and processing information.[151] The term "information overload" is generally used to acknowledge that people exhibit limited processing capacity and can become overwhelmed by a deluge of information or choices.[152]

Two main arguments follow this straightforward observation. First, consumers are likely to consider only a *limited* number of aspects with regard to any given transaction while *ignoring* other characteristics that are not made salient. Whereas it is widely agreed that market pressure can ensure efficiency with relation to those products' attributes that are being shopped and compared (i.e., salient), sellers are expected to engage in a race-to-the-bottom with respect to other attributes that are frequently ignored by consumers.[153] As will be explained below, most of the terms that are typically incorporated into SFCs are not likely to be among those patent attributes that sellers compete over.

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151. *See generally* Byung-Kwan Lee, The Effect of Information Overload on Consumer Choice Quality: The Moderating Role of Product Knowledge (2001), http://www.ciadvertising.org/student_account/fall_01/adv392/bklee/paper2/home.htm ("[U]p until now, information load studies have not produced unequivocal results. Some researchers found its presence but others did not." (quote found in "General Discussion" section; follow "General Discussion" hyperlink)).

152. *See, e.g.*, David M. Grether, Alan Schwartz, & Louis L. Wilde, *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 278 (1986) (using a similar definition merely as a starting point).

153. *See generally* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

Second, it is not only that consumers are expected to consider a limited array of attributes, but that too much information can harm consumers in different ways and lead them to ignore *important* information they would have chosen to consider were they not overwhelmed by its excess. I now elaborate on these two arguments.

1. Information Overload and Consumer Contracts

Since people cannot absorb and efficiently analyze all available information, they are compelled to satisfice, rather than to maximize or optimize.[154] That consumers are not likely to utilize all relevant information included in SFCs can be further illustrated by referring to Korobkin's argument.[155]

Making optimal consumption decisions requires consideration and evaluation of all relevant contract terms. Theoretically, in order to compare different products with different attributes, a consumer ought to employ what is known as the "weighted adding strategy."[156] Under this strategy, a consumer (as a decisionmaker) is supposed to assign a weight to every potential product attribute she wishes to compare. Important features receive relatively high weight while less significant attributes are given less weight. In the next stage, the consumer presumably scores each product characteristic. Finally, the decisionmaker multiplies the weight and the given score, then adds all factors for one total score. This score will represent the product's overall quality from consumer's viewpoint. Therefore, a consumer who seeks to maximize utility chooses the product that received the highest total score.[157]

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154. The distinction between optimizing and satisficing is a fundamental distinction which is applied frequently in many contexts: Whereas "to optimize" means to choose the best option available, "to satisfice" means to choose a satisfactory option considering the circumstances.

155. *See generally* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

156. This strategy is discussed in many different decision-making contexts. *See id.* at 1220; *see also, e.g.*, James R. Bettman, Mary Frances Luce & John W. Payne, *Constructive Consumer Choice Processes*, 25 J. CONSUMER RES. 187 (1998) (applying this strategy in the context of consumers).

157. For those who find the idea behind the weighted adding strategy a subtle one, a concrete numerical example is provided next. Assume, for example, that

Obviously, employing such a strategy requires time, information, mental ability, and mental attention. As the scope of relevant information increases, it becomes more difficult to reach a truly informed, rational (and thus efficient) decision.[158]

Whereas it is true that the weighted adding strategy maximizes utility and promises sufficient incentives for sellers to provide efficient SFCs, consumers are not likely to follow this decision making method in real life.[159] As decision making becomes more and more complicated,[160] consumers will try to find shortcuts that

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a buyer seeks to purchase an automobile. At the first stage, the buyer identifies the characteristics she wishes to compare. Let's assume that there are only five features she values (and thus compares): safety, financing, warranty, maintenance expenses, and the cost of insurance. At the next stage, every factor is given a weight, according to its relative importance. For example, safety scores 40%; financing—20%; warranty—20%; maintenance expenses—10%; and cost of insurance—10% (reaching 100% in total). At the next stage, the buyer scores each attribute of every product being compared and multiplies it with the attribute's weight. Implementing this method with one car can result in the following evaluation (assuming each characteristic will be graded on a 1 to 100 point scale): Safety receives a complete satisfaction score of 100—the final score for this attribute is 40% × 100 = *40*; financing receives a relatively high degree of satisfaction score of 80—its final attribute score is 20% × 80 = *16*; warranty receives an average satisfaction score of 50—its final attribute score is 20% × 50 = *10*; maintenance receives an above average satisfaction score of 70—its final attribute score is 10% × 70 = *7*; and insurance expenses receives a score of 60 and a final attribute score of 10% × 60 = *6*. It follows, then, that this specific car will get a total score of 40 + 16 + 10 + 7 + 6 = 79. This application, however, referred to only one car. After repeating the process for all cars that are being compared, the rational decisionmaker chooses the one that got the highest overall score.

158. *See* Korobkin, *supra* note 155, at 1226–29 (discussing complexity and selectivity).

159. *See id.* at 1223–25; *see also, e.g.*, Hillman & Rachlinski, *supra* note 43, at 435–45.

160. In the modern era, it is believed that most products and services that are accompanied by form contracts "are characterized by a relatively large number of attributes concerning functionality, aesthetics, cost, and terms." Korobkin, *supra* note 154, at 1229.

will enable them to reach satisfactory decisions without coping with *all* available information.[161]

These fundamental observations entail that, in the process of satisficing, consumers ignore non-salient products attributes.[162] Korobkin's key point is that SFC terms are among those attributes that are likely to be overlooked by consumers. This important prediction relies on the factual premise that "relative to other product attributes, form terms . . . usual content makes them unlikely to attract buyers' voluntary or involuntary attention."[163] This reality, in turn, creates a market failure that results from sellers' race-to-the-bottom since it provides contract drafters with a profit incentive to include low quality (non-salient) terms in their pre-drafted forms.[164]

Korobkin focuses on the effect of information overload in the context of relevant yet excessive information. In so doing, he mainly considers other products' attributes in addition to what can be found in form contracts. Yet, as Eisenberg explains, information overload makes form terms likely to be non-salient not only because of the amount of general information that can be found with respect to any given product,[165] but also because many

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161. For a brief review of a few practical and prominent consumer choice strategies that fall below the accuracy that a weighted adding strategy offers, see, for example, *id.* at 1223–25; *see also* Bettman et al., *supra* note 156, at 190–92.

162. *See, e.g.*, Korobkin, *supra* note 154, at 1225.

163. *Id.* at 1226. Korobkin defends this premise *id.* at 1231 (referring to terms that "are likely to cause elevated stress levels for buyers"); at 1232 (discussing terms that "govern eventualities that are extremely unlikely to occur" making it hard for decisionmakers to calculate properly); and at 1233 (noting that form terms are often presented "in ways that make them hard to read, hard to understand, and hard to compare . . . .").

164. *See, e.g.*, Bar-Gill, *supra* note 99, at 1376 (arguing that this is the case in credit card contracts and noting that "if the credit card market is indeed as competitive as it appears to be, issuers *have to* exploit consumers' imperfect rationality in order to survive in this market"); Eisenberg, *supra* note 71, at 244 ("Indeed, competition is likely to degrade the quality of preprinted terms [e.g., in the context of a bank agreement]. Once some banks offer low-quality preprinted terms, competition will force other banks to include the same low-quality terms in their form contracts, so as not to be undercut on activity charges and interest rates. This is a special case of the market-for-lemons phenomenon.").

165. I here refer to information that is relevant to the product but does not directly involve the SFC itself (e.g., shape, color, consumer reports, etc.).

terms incorporated into SFCs are irrelevant and unnecessary. As will be explained next, encountering irrelevant, dense text *within* SFCs can lead to non-salience, just as encountering too much (relevant) information outside of the contract can.

2. Further Hazards of Information Overload

One of the first references to the problem of information overload arguably unsolved by traditional legal means arose with reference to consumer credit transactions.[166] In this respect it was argued that due to information disclosure requirements consumers are exposed to too much information that can overwhelm them. Later on, the debate became more general and inclusive in its proposed analysis.

One main approach toward information overload was expressed by Grether, Schwartz, and Wilde.[167] In their seminal article, Grether et al. confront the question whether information disclosure can harm consumers through information overload.[168] They acknowledge that information overload can theoretically harm consumers in three different ways. They nevertheless argue that information overload is basically irrelevant in competitive markets.

First, Grether et al. address the possibility that information disclosure can cause confusion. This theoretical fear is that some consumers may "inadvertently or erroneously devote time to observing this [irrelevant] attribute that they would have devoted to observing the things that do concern them, and thereby make the wrong decision."[169] They dismiss this argument, noting that there

166. *See generally* Jeffery Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts*, 63 VA. L. REV. 841 (1977).

167. Grether et al., *supra* note 152.

168. Grether et al. explicitly claim that their analysis is extendable to consumer contracts. *Id.* at 281 n.7 ("The text speaks mainly of search for products because the literature discusses products, but its analysis extends to contract terms. A contract can be regarded as another product attribute or as a product that has several attributes (i.e., different terms).").

169. *Id.* at 285.

is no evidence supporting the assertion that consumers cannot efficiently ignore irrelevant information.[170]

I find this line of reasoning quite problematic insofar as it is applied to SFC terms.[171] Consumers who read form contracts can, indeed, get confused due to what they find in print. Reading SFCs requires legal understanding of many subtle issues. Although there might be no empirical evidence supporting this doubt,[172] distinguishing between relevant and irrelevant contract terms is a very demanding task. Therefore, consumers who attempt to compare SFCs might indeed get confused by what they read and devote valuable resources for obtaining information on issues that are not worth this investment. Clearly, focusing one's attention on redundant information might undermine optimal decision making.

Second, Grether et al. examine the argument that information overload can harm consumers if the process of deciding which information to ignore "will make consumers feel frustrated or dissatisfied."[173] They reject this allegation, reasoning that ideal disclosure should increase consumer choice since it allows consumers to observe a larger range of product's attributes. According to this reasoning, ignoring (or not using) information should not cause unhappiness to consumers.[174] Moreover, they reason, consumers are presumed to report more satisfaction with purchase choices when they believe they have more information on

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170. *Id.*

171. Interestingly, some scholars have pointed out that consumers indeed find it hard to distinguish between the different types of information, and that this hardship might inflict harm on them. *See* Camerer et al., *supra* note 78, at 1235. A prominent example is the one of food labeling, such as "low-fat" or "fat free." In this context it is argued that requiring retailers to display detailed facts concerning food content "may have even contributed to the epidemic of eating disorders in the United States." *Id.* (footnote omitted).

172. Generally speaking, empirical evidence tailored to the context of consumer SFCs is rare, and there are only a few empirical studies on this subject. For an exceptional example, see Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contracts Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*, 15 BEHAV. SCI. & L. 83 (1997).

173. Grether et al., *supra* note 152, at 285.

174. *Id.* (reasoning that "lowering airfares to a place one does not want to go should produce no emotion or the pleasant thought that if one's preference change, one can satisfy the new preference more easily").

which to base their decision, regardless of whether they actually use the whole range of available information.[175]

This explanation is a credible one in some consumer contexts, but quite questionable in the context of SFCs. It is more than reasonable to assume that exposure to SFC terms that one cannot easily read and understand may indeed result in consumers' frustration or dissatisfaction. Encountering information that one cannot effectively analyze is certainly likely to result in some kind of disturbance. Reading a text without being able to understand it can definitely be emotionally frustrating.[176]

There is another possible harm, grounded on the traditional consumer search behavior theory that Grether et al. discuss in their article. This third concern is that irrelevant information can be destructive to consumers who seek certain information "if it raises the costs to them of observing attributes in which they are interested."[177] Moreover, if the search cost associated with observing desired attributes increases sufficiently, consumers might even cease to detect these attributes.[178]

Interestingly, Grether et al. reject this concern as well. First, they find this danger inapplicable where simple products are involved. Since simple products have few salient dimensions, and since observing few important attributes is not a challenging task, they opine that it is unlikely that consumers will find information gathering to be too expensive or complicated. They argue that when it comes to complex and expensive products consumers tend to shop extensively. Thus, they reason, "the presence of some state-required irrelevant information in connection with the sale of these products should seldom cause consumers to truncate search over attributes they care about."[179]

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175. *Id.* at 285 n.16 (referring to studies that support this claim).

176. *See* Melvin Aron Eisenberg, *Comments: Text Anxiety*, 59 S. CAL. L. REV. 305, 309 (1986).

177. Grether et al., *supra* note 152, at 286.

178. *Id.* (noting that in such a case information disclosure will *produce* a market failure, rather than *cure* it).

179. *Id.* Moreover, they argue, decisionmakers should limit disclosure requirements to attributes with which a substantial number of consumers are concerned, thus reducing the average search costs. *Id.*

Though this argument may be valid in some contexts of information disclosure, SFCs are different. When dealing with such contracts, it seems doubtful that the "extensively shopping" rationale is a compelling one. There are various justifications that lead consumers not to shop (let alone shop extensively) among different SFCs. Among these reasons are the increased costs imposed on the consumers due to the incorporation of irrelevant or unimportant contract terms.[180] As a result, even if consumers still opt to shop for information, the existence of irrelevant information is likely to make this search more expensive and thus, at times, less likely to occur.

Information gathering and information disclosure are important components in mitigating the problem of asymmetric information in consumer contracts. Nonetheless, information and disclosure duties are not panaceas. This part demonstrates why, and under what circumstances, information *per se* cannot guarantee optimal or efficient consumer behavior and decision making in the context of SFCs.

As explained, buyers are likely to find it hard (i.e., expensive in terms of mental efforts and time) to distinguish between relevant and irrelevant information which form contracts contain. This hardship can harm consumers, since they may get confused by superfluous information and mistakenly pay attention to it (instead of paying attention to the important information necessary for making informed decisions). Devoting resources to gather and analyze non-essential information might result in erroneous decision making. Another problem with excessive information is that it might cause emotional frustration and dissatisfaction to consumers. This is especially true since consumers are not equipped with the necessary expertise to understand form contract clauses. Last but not least, redundant information raises consumers' search costs. Where the increased costs are sufficiently high, incorporation of unnecessary information might encourage consumers to opt not to read form contracts.

Moreover, even if consumers are able to easily and cheaply locate the relevant information without encountering emotional frustration, they are likely to display sub-optimal evaluation of

180. *See, e.g.*, Eisenberg, *supra* note 71, at 243.

such information. Employing an optimal decision making approach as required by expected utility models (such as the weighted adding strategy) is an extremely demanding task. Limited human capacity and information overload compel consumers to satisfice, and thus to ignore some aspects of the transactions they enter. Among these non-patent attributes likely to be ignored by consumers are SFC terms.

If buyers do not read SFC terms and thus do not obtain accurate information as to the substance of their contracts, market forces will drive sellers to offer only low-quality contract clauses. Engaging in a race-to-the-bottom with relation to non-salient contract terms allows sellers to compete over salient attributes, most prominently on price.[181] This provides an additional explanation as to why consumers alone are incompetent to drive the market of SFC terms to equilibrium where efficient contracts are being drafted.

CONCLUSION

The interdisciplinarism in the field of SFCs (as in the case of contract law in general) is dominated by law and economics scholarship. The importance of traditional law and economics analysis of SFC is evident, but some of its analysis and presumptions should not be left unchallenged.

In a recent article, Eric Posner questions the success of economic analysis of contract law, both normatively and descriptively.[182] As Posner asserts, one of the possible alternative (or, to my mind, supplementary) methodologies to economic analysis of contract law is a psychological approach.[183] The framework sketched in this Article undertakes the challenge of

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181. *See, e.g.*, Korobkin, *supra* note 154, at 1206 ("[M]arket competition actually will *force* sellers to provide low-quality non-salient attributes in order to save costs that will be passed along to buyers in the form of lower prices.").

182. *See generally* Posner, *supra* note 10. Interestingly, Posner uses consumer contracts and the doctrine of unconscionability as one example that demonstrates the failure of economic analysis of law. *Id.* at 842–45.

183. *Id.* at 872–73. Posner does not find this alternative persuasive, specifically "in the face of the poor fit of cognitive psychology and the penalty doctrine." *Id.* at 873.

making this methodology more appealing and more feasible insofar as consumer contracts are at issue.

The law and economics study of SFCs teaches us how important it is to focus on the key aspects of transaction costs and obligational asymmetric information. This Article seeks to strengthen this analytical concept by employing behavioral concepts. These concepts profoundly enrich our understanding as to why obligational asymmetric information exists, what its potential harmful consequences are, and how the law can better address it.

Furthermore, behavioral insights demonstrate that people sometimes make bad choices even where good information is available. Given these circumstances, information disclosure cannot ensure optimal decision making. In this sense, both the neoclassical economic analysis of asymmetric information and the behavioral analysis presented here attempt to provide criteria that can successfully distinguish between consumption decisions that consumers make due to true preferences and those that are a result of some kind of mistake.

Although cognitive psychology has much to contribute to the study of SFCs, it has been largely overlooked by lawyers, judges, academics, and legislators. To be sure, there have been some important attempts to bring cognitive psychology into the subjects of consumer protection law and SFCs. Yet, these efforts do not systematically encompass all relevant perspectives. This Article attempts to fill some gaps between the social literature in the field of decision making and its legal application to consumer contracts.

Current approaches of contract law fail to provide an adequate solution to the problems that SFCs pose. Behavioral insights make it clear that one of the main reasons for this failure is under-appreciation of consumers' cognitive limitations and actual behavioral patterns. Without acknowledging those patterns, attempts to regulate form contracts and judicial control over them can yield only partial solutions. For the law that governs SFCs to deliver optimal results, it must be based on the most accurate and up-to-date understanding of human behavior.

More specifically, this Article has discussed four groups of behavioral patterns that might prevent consumers from reading and efficiently evaluating SFCs, thus allowing sellers to manipulate

consumers in various ways. The surroundings that accompany many SFCs, the process and structure of standard form contracting, the content of most SFCs, and the informational environment that typically escort consumer contracts, all suggest important insights that help to explain consumers' inability to maximize utility by contracting via standardized agreements.

As to the contracting *environments*, emotional stress and the unfavorable surrounding conditions accompany many form contracts. Under such circumstances, decisions are likely to be made less carefully. When it comes to the contracting *process*, consumers are exposed to the sunk costs effect, cognitive dissonance, confirmation bias, and low-ball technique. Previous time and effort investment accompanied by perceptions of self-commitment may prevent buyers from reading the contracts that they enter or from rationally evaluating them.

Alas, consumers are disadvantaged not only with respect to the surroundings and the process of standard form contracting, but also with relation to the *specific content* of many SFCs. Cognitive failures, such as the availability cascades, over-optimism, and individuals' inability to correctly evaluate low-probability risks, can result in distortion of risk perception. In turn, these phenomena undermine consumers' ability to correctly price contractual terms that allocate risks among contracting parties.

On top of it all, even if consumers were able to overcome these hardships and biases, they are not likely to reach optimal decisions due to the *informational* environment that typically accompanies modern products. As explained, information overload might undercut efficient contracting in various ways. Most significantly, it raises the costs of information gathering and makes it less likely that consumers will carefully read SFCs.

The importance of questioning consumers' rationality in the context of SFC terms cannot be overstated. Cognitive errors impede the idea that open market forces can achieve an efficient and just equilibrium. Behavioral insights put forward a variety of phenomena that make it easier on sellers to manipulate consumers. Any general theory of and practical approach to consumer contracts must take cognitive biases and actual behavioral patterns into account. To do otherwise would be unconscionable.